No. 14-15

Title:	Richard Armstrong, et al., Petitioners
	v.
	Exceptional Child Center, Inc., et al.
Docketed:	July 7, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-35382)
Decision Date:	April 4, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Jul 2 2014	Petition for a writ of certiorari filed. (Response due August 6, 2014)
Jul 29 2014	Order extending time to file response to petition to and including September 5, 2014.
Aug 6 2014	Brief amici curiae of Texas, et al. filed.
Aug 27 2014	Brief of respondents Exceptional Child Center, Inc., et al. in opposition filed.
Sep 9 2014	Reply of petitioners Richard Armstrong, et al. filed.
Sep 10 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 2 2014	Petition GRANTED limited to Question 1 presented by the petition.
Nov 17 2014	Joint appendix filed. (Statement of costs filed)
Nov 17 2014	Brief of petitioners Richard Armstrong, et al. filed.
Nov 17 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Nov 19 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Nov 21 2014	SET FOR ARGUMENT ON Tuesday, January 20, 2015
Nov 24 2014	Brief amicus curiae of United States filed.
Nov 24 2014	Brief amici curiae of Texas, et al. filed.
Nov 24 2014	Brief amici curiae of National Governors Association, et al. filed.
Nov 24 2014	Brief amicus curiae of California Health and Human Services Agency filed.
Dec 2 2014	Record requested from U.S.C.A. 9th Circuit.
Dec 2 2014	Record requested from U.S.C.A. 9th Circuit is electronic and located on PACER.
Dec 2 2014	Record from U.S.D.C. District of Idaho is electronic and located on PACER.
Dec 12 2014	CIRCULATED.
Dec 17 2014	Brief of respondents Exceptional Child Center, Inc., et al. filed. (Distributed)
Dec 18 2014	Brief amicus curiae of Medicaid Defense Fund filed. (Distributed)
Dec 19 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus

	curiae and for divided argument filed.
Dec 22 2014	Brief amici curiae of National Health Law Program, et al. filed. (Distributed)
Dec 22 2014	Brief amici curiae of American Civil Liberties Union, et al., filed. Distributed.
Dec 23 2014	Brief amici curiae of The American Network of Community Options and Resources, et al. filed. (Distributed)
Dec 23 2014	Brief amici curiae of The American Hospital Association, and Federation of American Hospitals filed. (Distributed)
Dec 23 2014	Brief amici curiae of Former HHS Officials filed. (Distributed).
Dec 23 2014	Brief amici curiae of American Medical Association, et al., filed. (Distributed)
Dec 23 2014	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed)
Dec 24 2014	Brief amici curiae of Members of Congress filed. (Distributed)
Dec 24 2014	Brief amici curiae of American Association of People with Disabilities, et al., filed. (Distributed).
Dec 24 2014	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Jan 9 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 13 2015	Reply of petitioners Richard Armstrong, et al. filed. (Distributed)
Jan 20 2015	Argued. For petitioners: Carl J. Withroe, Deputy Attorney General, Boise, Idaho; and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: James M. Piotrowski, Boise, Idaho.
Mar 31 2015	Judgment REVERSED. Scalia, J., delivered the opinion of the Court with respect to Parts I, II, and III, in which Roberts, C. J., and Thomas, Breyer, and Alito, JJ., joined, and an opinion with respect to Part IV, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Breyer, J., filed an opinion concurring in part and concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Kennedy, Ginsburg, and Kagan, JJ., joined.
May 4 2015	JUDGMENT ISSUED.

RECORD AND BRIEFS

14-15

No. _____

Supreme Court, U.S.
FILED
JUL - 2 2014
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To receive federal Medicaid funding, a state must adopt a plan containing "methods and procedures" that will "safeguard against unnecessary utilization" of Medicaid services and "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available at least to the extent that such care and services are available to the general population." 42 U.S.C. § 1396a(a)(30)(A). Congress chose not to confer on Medicaid providers any enforceable rights under this statute. The Ninth Circuit in this case, however, held that (a) Medicaid providers could enforce § 1396a(a)(30)(A) directly under the Supremacy Clause; and (b) the State of Idaho's Medicaid reimbursement rates were preempted by that statute because they did not "substantially reimburse providers their costs" and because they remained in place "for purely budgetary reasons."

The questions presented are:

1. Does the Supremacy Clause give Medicaid providers a private right of action to enforce § 1396a(a)(30)(A) against a state where Congress chose not to create enforceable rights under that statute?

2. If Medicaid providers have a private right of action, are a state's Medicaid provider reimbursement rates preempted by § 1396a(a)(30)(A) where they do not bear a reasonable relationship to provider costs and remain in place for budgetary reasons?

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OPINIONS BELOW

This petition seeks review of one opinion of the U.S. Court of Appeals for the Ninth Circuit, which is unreported and reproduced at App. 1. The initial opinion of the U.S. District Court for the District of Idaho is unreported and reproduced at App. 15. The district court's memorandum decision on Petitioners' motion for reconsideration is unreported and reproduced at App. 7. The judgment of the district court is reproduced at App. 5.

JURISDICTION

The court of appeals issued its decision on April 4, 2014. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

> or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

2. A provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), provides:

> A State Plan for medical assistance must –
>
> * * *
>
> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

INTRODUCTION

The questions in this case present the Court with an opportunity to resolve two significant and recurring issues relating to the proper function of the Supremacy Clause and the administration of Medicaid. The circuits do not agree whether or when the Supremacy Clause supplies a private right of action to enforce Medicaid funding conditions against states

in the absence of Congressional intent to create either a right or remedy for their alleged violation. The Ninth Circuit in this case held that the Supremacy Clause supplies a right of action, as have four other circuits. This Court granted *certiorari* in *Douglas v. Independent Living Center, Inc.*, 132 S. Ct. 1204 (2012) ("*Independent Living*") to decide exactly this question. Post-argument procedural events produced a remand, and so the Court did not reach the question. The Chief Justice, joined by three other Justices, dissented, and would have held that the Supremacy Clause does not supply a right of action of its own force where Congress has not created an enforceable right. One circuit and one state high court has taken influence from the Chief Justice's *Independent Living* dissent and held that the Supremacy Clause does not supply right of action. Another circuit, while not reaching the issue, has expressed doubt that the Supremacy Clause provides a private right of action. The Ninth Circuit's decision rests on an erroneous reading of this Court's cases, and review is warranted to resolve this fundamental question about the role of the Supremacy Clause. The importance of resolving this question is only underscored by the Ninth Circuit's erroneous decision on the merits.

The court of appeals held the State of Idaho's provider reimbursement rates preempted by 42 U.S.C. § 1396a(a)(30)(A) ("§ 30(A)") because they did not substantially reimburse provider costs and because they stayed in place solely for budgetary reasons. Review is warranted to undo the Ninth Circuit's

rewrite of this statute. No other circuit has imposed the requirements the Ninth Circuit has. This is for good reason: The Ninth Circuit's interpretation has no basis in the statutory text and it conflicts with the views of the federal agency entrusted with administering the statute. It imposes requirements Congress did not intend (and that the State did not bargain for). And finally, it frustrates Congress' intent by inhibiting states' flexibility to design their programs and by disrupting the federal-state partnership Congress created.

This case presents the opportunity to resolve at last these issues and end the Ninth Circuit's erroneous foray into the administration of Medicaid. The events triggering the remand in *Independent Living* are not capable of occurring here. There is no pending action before the Centers for Medicare and Medicaid Services, the basis for the court of appeals' decision is clear, and the facts are straightforward.

STATEMENT OF THE CASE

1. Medicaid is a cooperative federal-state program that directs federal funding to participating states to provide medical assistance to "families with dependent children [and] aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. States do not have to participate in Medicaid, but if they do, federal funding

is conditioned on compliance with the Medicaid Act and its implementing regulations promulgated by the Secretary of the U.S. Department of Health and Human Services, otherwise known as "HHS." *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

One such condition is that states adopt and submit "plan[s] for medical assistance" to the Centers for Medicare and Medicaid Services ("CMS") for approval. 42 U.S.C. § 1396a(a); *see also* 42 C.F.R. § 430.10. These plans must:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

This Court has said that Congress has given HHS "exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (citation omitted). And within basic, often broadly written requirements, states have substantial flexibility in designing and administering their Medicaid

programs. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985). A state's flexibility is not unchecked, though. Part of the ongoing relationship between the states and CMS includes periodic program reviews by CMS, 42 C.F.R. § 430.32(a), and the HHS Office of Inspector General conducts periodic audits, 42 C.F.R. § 430.33. The state has the opportunity to submit facts in aid of its position or accept and correct violations. *Id.* § 430.33(c).

If CMS believes a state has failed to correct a violation, Congress has given HHS a powerful enforcement mechanism. CMS may initiate a compliance action and withhold federal funds. 42 U.S.C. § 1396c; 42 C.F.R. § 430.35. If, for example, a state's Medicaid expenditures are inconsistent with its state plan, CMS may disallow the expenditure and force the state to repay federal funds. *See id.* §§ 430.33(c)(3), 430.42(a), 430.35(d). The state may request a hearing if it does not like the disallowance, and private parties, like providers, may participate. *Id.* § 430.76. These parties may conduct discovery and offer opinion and expert testimony. *Id.* §§ 430.83, 430.86, 430.88. CMS's decision is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*.

2. Medicaid includes a basic bundle of services, but states may receive funding to provide additional services through waivers. Congress authorized the Developmentally Disabled Home and Community Based Services Waiver – known as the "DD Waiver" –

to assist states in funding a variety of non-institutional care options for persons who would be eligible for Medicaid benefits in an institution, but who prefer to live at home or in the community. 42 U.S.C. § 1396n(c)(1); *see also Sanchez v. Johnson*, 416 F.3d 1051, 1054 n.1 (9th Cir. 2005). The services at issue in this case are called "residential habilitation" services. Idaho has had a DD Waiver since 1995 and provides these services through contracted providers.

This case involves Idaho's reimbursement rates for residential habilitation services under the DD Waiver. The challenged rates were increased by the Idaho Department of Health and Welfare, which is the State's Medicaid agency, in 2006. App. 17. The Department does not typically include the reimbursement rates for these services in its state plan or waiver documents. (Nor is it required to. It simply must maintain documentation of those rates and make them available to CMS on request. 42 C.F.R. § 447.203.) Rather, the State's DD Waiver documents identify the methods and procedures the Department follows to set rates. Once the Department establishes rates, it publishes them in a pricing file, which is made available to Medicaid providers through Information Releases and is published on the Department's website. The providers provide the services and then bill the Department, which reimburses them. The Department then draws its allocation of federal Medicaid money quarterly.

Federal and state regulations limit provider participation to those that agree to accept, as payment

in full, the amounts that the state pays them. 42 C.F.R. § 447.15; Idaho Admin. Code § 16.03.09.210.03. State regulations limit provider reimbursement to the lower of the provider's actual charge or the maximum allowable charge as established by the Department. Idaho Admin. Code § 16.03.10.036.02.

In 2005, the Idaho Legislature adopted a new law directing the Department to compile information relating to the cost of care. *See* Idaho Code § 56-118 (2005) (*amended by* 2011 Idaho Sess. Laws 463). App. 18. The statute directed the Department to furnish this information to the Legislature annually as part of its budget request. The statute did not require any changes in rates based on the information it compiled.

In 2006, the Department hired a firm to conduct surveys to implement § 56-118. The firm produced recommended rates based on varying alternative methodologies for various services each year. App. 18. The Department did not implement the rates in the firm's reports, but continued to report the information to the Legislature each year. In 2009, the Department proposed rate increases for the services at issue in this case. App. 19. However, the Department did not receive an appropriation for the increases from the Idaho Legislature, so the Department did not finalize the methodology change or increase the rates. At no time relevant to this case has CMS ever initiated any compliance action or otherwise complained

about the State's rates or its compliance with the DD Waiver.

3. Question Two in this petition concerns the role of provider costs in setting and maintaining reimbursement rates under § 30(A). The Secretary of HHS has not adopted any regulation addressing how states may demonstrate compliance with § 30(A). The Ninth Circuit, however, has given § 30(A) a reading that imposes substantive requirements on states that do not appear in the text of the statute. To explain: In *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998), the court of appeals read § 30(A) to require states to set hospital outpatient reimbursement rates so that they "bear a reasonable relationship" to provider costs, and to "rely on responsible cost studies" before reducing reimbursement rates. 103 F.3d at 1496. Where rates do not "substantially reimburse providers their costs," a state cannot justify the rates with "purely budgetary reasons." *Id.* at 1499 & n.3. Since then, the Ninth Circuit has reaffirmed and expanded these requirements several times in other cases – including the cases vacated by the Court on other grounds in *Independent Living*.

In 2011, HHS issued a proposed rule setting forth a comprehensive and detailed approach to demonstrating compliance with § 30(A). 76 Fed. Reg. 26,342, 26,343 (May 6, 2011). The proposed rule would have implemented a three-part, flexible framework by which states would monitor access to care using

many factors. *Id.* at 26,343-26,346. HHS noted that there was "no consensus among the circuits" about how states comply with § 30(A), and cited the differing approaches taken by the Ninth Circuit in *Orthopaedic Hospital v. Belshe* and the Seventh Circuit in *Methodist Hospitals, Inc. v. Sullivan*, 91 F.3d 1026 (7th Cir. 1996) (which did not require cost studies or other procedural requirements). 76 Fed. Reg. at 26,343. The agency explained that cost is one consideration that affects access, but that there are many others, and that "cost-based studies may not always be informative or necessary." *Id.* at 26,344. It did not propose to require the approach the Ninth Circuit has taken. *See id.*

The rulemaking status is unclear. In the three-plus years since the proposed rule was published in the Federal Register, no final rule has been adopted, and Petitioners have no information that HHS has taken any further steps toward implementing the rule or even that HHS intends to proceed with this rulemaking.

4. Respondents contract with the State to provide services under the DD Waiver. They sued the Department on December 7, 2009. They did not sue the Secretary of HHS or CMS. Respondents claimed that based on the new cost information, the Department's rates were preempted by § 30(A) because they were not consistent with the Ninth Circuit's requirements from *Orthopaedic Hospital v. Belshe*.

On cross-motions for summary judgment, the district court noted that the record "would appear to support" a finding that the then-existing rates were consistent with precisely the things § 30(A) is concerned with: efficiency, economy, and quality of care. App. 22. And there had been no dispute about access to care, either: The parties agreed that services covered by the DD Waiver were readily available to eligible participants and there was no dispute that there were no waiting lists for any Medicaid services in Idaho. The record before the district court and court of appeals contained no evidence that rates were inefficient or uneconomical. Rather, the providers relied solely on the mere existence of new provider cost information to claim that the Department violated § 30(A).

The district court recognized, too, that *Orthopaedic Hospital v. Belshe* and later cases involved rate cuts, not challenges to existing rates. App. 21. Yet, in light of the more recent cost information, the district court ruled that existing rates failed the requirements of *Orthopaedic Hospital v. Belshe*. App. 22. "The Court need not wait for evidence of low quality of care or insufficient access to services before intervention is warranted," it said. App. 22-23. The court granted the providers' motion for summary judgment and issued an injunction requiring that the Department raise its rates to match those proposed in 2009. App. 24.

On appeal, the Ninth Circuit held first that the providers had a private right of action under the Supremacy Clause to challenge Idaho's rates as

preempted by § 30(A). App. 2-3, *quoting Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008) ("Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The court of appeals deemed itself bound by circuit precedent and this Court's precedents "that have recognized a private right of action under the Supremacy Clause." App. 3, *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

On the merits, the court held that, under *Orthopaedic Hospital v. Belshe*, because the State's reimbursement rates did not substantially reimburse providers their costs and remained in place for purely budgetary reasons, the district court correctly granted summary judgment to the providers. App. 4.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AND DECIDE WHETHER THE SUPREMACY CLAUSE GIVES MEDICAID PROVIDERS A PRIVATE RIGHT OF ACTION TO ENFORCE 42 U.S.C. § 1396a(a)(30)(A) AGAINST STATES WHERE CONGRESS HAS CHOSEN NOT TO CREATE ANY ENFORCEABLE RIGHTS.

A. Review is warranted because there is conflict in the circuits about whether and when Medicaid statutes are privately enforceable through the Supremacy Clause in the absence of a Congressionally created right or remedy.

1. This Court granted *certiorari* in *Independent Living* to decide whether Medicaid providers and beneficiaries had a Supremacy Clause right of action to challenge, as preempted by § 30(A), California laws reducing and imposing other limits on the payments that the state made to various Medicaid providers. 132 S. Ct. at 1208. The suit came after California submitted plan amendments to implement payment cuts, but before CMS acted on them. After oral argument in this Court, CMS approved several of the amendments. *Id.* at 1209.

Five to four, this Court held that CMS's decision meant that the plaintiffs may have to seek review of that decision under the federal Administrative Procedure Act rather than pursue an injunction against the state from a federal court under the Supremacy

Clause. *Id.* at 1210. The dissenters would have held that "[w]hen Congress did not intend to provide a private right of action to enforce a statute enacted under the Spending Clause, the Supremacy Clause does not supply one of its own force." *Id.* at 1215 (Roberts, C.J., dissenting).

2. Without clear guidance from this Court, a split has developed in the circuits. One side of the split holds that a Supremacy Clause right of action exists to enforce Medicaid statutes even in the absence of a federal right or remedy. *See Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 819 & n.3 (D.C. Cir. 2004) (suggesting this Court has *sub silentio* endorsed Supremacy Clause right of action); *Lewis v. Alexander*, 685 F.3d 325, 345-46 (3d Cir. 2012) ("Supreme Court precedent establishes that the Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law.") (citation omitted); *Planned Parenthood of Houston and Se. Tex. v. Sanchez*, 403 F.3d 324, 332 & n.31 (5th Cir. 2005) (suggesting the Court has "apparently accept[ed]" existence of Supremacy Clause right of action) (footnotes omitted); *Detgen ex rel. Detgen v. Janek*, No. 13-10396, 2014 WL 2013532 (5th Cir. May 16, 2014) (beneficiaries have Supremacy Clause right of action to enforce "reasonable standards" provision of Medicaid, 42 U.S.C. § 1396a(a)(17)); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006).

The Ninth Circuit in this case made short work of the question, simply citing *Independent Living Center of Southern California v. Shewry* for the idea

that the Supremacy Clause supplies an implied right of action. That case illuminates the court's rationale a bit better. The court there enjoined California's implementation of legislation cutting provider payments by ten percent. 543 F.3d at 1052. The state contended that the suit was foreclosed because the court of appeals had previously held in *Sanchez v. Johnson* that § 30(A) conferred no rights or rights of action under 42 U.S.C. § 1983. That was, to the court, immaterial, because, it wrote, this Court has "repeatedly entertained" preemption cases under the Supremacy Clause without requiring that the plaintiff satisfy § 1983. *Id.* at 1055-56.

3. To this broad view of the Supremacy Clause, the Tenth Circuit recently said, "No." The court held in *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814 (10th Cir. 2014), that the operator of family planning clinics could not challenge as preempted by Title X of the Public Health Service Act a Kansas law limiting what types of providers may receive grants under that state's program. The court relied significantly on the Chief Justice's dissent in *Independent Living* and expressly rejected the rationales espoused by the courts holding that a Supremacy Clause right of action exists even in the absence of Congressionally created rights or remedies. *Id.* at 826-27, 836 n.7.

The court found, too, that permitting private persons to seek injunctions for alleged violations of Title X would substantially interfere with HHS's administration of the program. *Id.* at 824-25, *citing*

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). It found Justice Breyer's concurrence in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) insightful. 747 F.3d at 825, *citing Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring) (noting Congress may have intended its remedy as exclusive "to achieve the expertise, uniformity, widespread consultation, and resulting administrative guidance" and to "avoid the comparative risk of inconsistent interpretations and misincentives" that may arise from litigation seeking damages under the statute). The flexibility of Medicaid – the "play in the joints" – as the court put it, is an "important, and apparently desirable" feature of Medicaid that private enforcement through the Supremacy Clause would thwart. *Id.*

The Seventh Circuit seems to align with the Tenth Circuit's view, although so far it has not committed itself. Without reaching the issue, the court in *Planned Parenthood of Indiana, Inc. v. Commissioner of Indiana State Department of Health*, 699 F.3d 962 (7th Cir. 2012), explained that the idea of a freestanding right to bring a preemption suit under the Supremacy Clause was "highly doubtful" for the reasons articulated by the Chief Justice in his *Independent Living* dissent. *Id.* at 983.

Finally, one state high court has followed the logic in the Chief Justice's dissent in *Independent Living* and held that where plaintiffs have no private right of action directly to claim a violation of § 30(A), they cannot do so by simply claiming a violation of

the Supremacy Clause. *Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of Health & Human Servs.*, 974 N.E.2d 1114, 1128 (Mass. 2012).

B. Review is warranted because in holding that the Supremacy Clause supplies a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against states, the Ninth Circuit has disregarded this Court's cases limiting the availability of a private right of action where Congress has not created one.

1. Respondents did not contend, and the Ninth Circuit did not hold, that Medicaid providers had any enforceable rights under the Medicaid Act. Far from it; the Ninth Circuit has held specifically that providers have no such rights. *Sanchez v. Johnson*, 416 F.3d at 1060-61. This does not present an obstacle in the Ninth Circuit, though, because as this case shows, in that circuit the Supremacy Clause provides the right of action to enforce federal law against conflicting state law, even where Congress has not created rights or made a statute privately enforceable. An allegation that a defendant has violated federal law is not enough to sue in federal court. There must be some authorization to seek a remedy, and that authorization must come from Congress: "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (citation omitted); *see also California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a

remedy on a statute, no matter how salutary, that Congress did not intend to provide."). The absence of a Congressionally created right or remedy is a defect in Respondents' suit that the Ninth Circuit disregarded.

The analytical framework for determining whether a right of action exists under a particular statute or through § 1983 differs somewhat, but the two inquiries share a common characteristic: Congress' intent is "dispositive." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). The "judicial task," therefore, "is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. at 286 (citation omitted). This is sensibly grounded in the separation of powers. "In the absence of congressional intent the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008), *quoting Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (1951) (citations omitted).

Congress' intent is particularly important in the context of statutes passed pursuant to Congress' spending power. Federal funding provisions are not privately enforceable "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to create individually enforceable rights. " *Gonzaga Univ. v. Doe*, 536 U.S. at 280, *quoting Pennhurst*

State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 28 & n.21 (1981). The Court has explained that Spending Clause legislation "is much in the nature of a contract," and that the "typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 17, 28 (citation omitted); *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1345 (2011) (rejecting third-party beneficiary claim to enforce drug-pricing statute; if plaintiff cannot sue under the statute itself, "it would make scant sense to allow them to sue on a form contract implementing the statute, setting out terms identical to those contained in the statute.").

Part of the inquiry in determining whether Congress intended to create an enforceable right focuses on the statute's wording and whether it is "so 'vague and amorphous' that its enforcement would strain judicial competence. " *Gonzaga Univ. v. Doe*, 536 U.S. at 282, *quoting Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Section 30(A) requires "methods and procedures" to ensure that "unnecessary utilization" is avoided and that payments are "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to meet the need for care. This language sets forth only "broad and general" terms. *Independent Living*, 132 S. Ct. at 1210. The statute is therefore not well suited to judicial enforcement. *See, e.g., Blessing v. Freestone*,

520 U.S. at 343. Even the Ninth Circuit has held that § 30(A)'s "broad and diffuse" terms have an "aggregate focus, rather than an individual focus that would be evidence of an intent to confer an individually enforceable right." *Sanchez v. Johnson*, 416 F.3d at 1059, 1060. The Ninth Circuit has not explained why § 30(A) is not "amenable to judicial remedy" under § 1983, *id.* at 1060, but fit for judicial remedy under the Supremacy Clause.

By acknowledging that the Medicaid Act creates no enforceable rights, yet permitting the providers' case to proceed directly under the Supremacy Clause anyway, the Ninth Circuit has disregarded Congress' intent and the "careful approach" this Court takes when considering whether Congress intended to create a private right of action. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. at 164. As the Chief Justice wrote in his dissent in *Independent Living*, "to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Independent Living*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting).

The Ninth Circuit's decision is inconsistent with Congress' intent in another way: Private suits to enforce § 30(A) interfere with CMS's administration of Medicaid. Section 30(A) provides a condition of funding. Its terms reflect Congressional intent to allow great flexibility. If a state agrees and complies,

it receives money to fund, in part, the state's Medicaid services. If CMS, in its expert judgment, determines that the state is not satisfying a particular condition, the state has an opportunity to correct or contest CMS's determination. If all of this fails, in the end there is a Congressionally created remedy – CMS takes the money back or refuses to fund the expenditure. The providers' suit in this case, however, did not include CMS. CMS had approved the methods and procedures the Department used and had never complained about the rates, or access, or quality, or efficiency, or economy. So the suit proceeded without the relative expertise of the agency entrusted to administer and enforce the program. Separate litigation inevitably subjects states to requirements beyond what Congress and CMS have established. *See Astra USA*, 131 S. Ct. at 1349. These requirements may not (and in this case, do not, *infra* Section II) comport with what Congress required and the manner in which CMS implements those requirements. The approach embraced by the Ninth Circuit disrupts Congress' plain intent to facilitate centralized administration and the attendant benefits of uniformity, consistency, and predictability. *Independent Living*, 132 S. Ct. at 1210-11.

2. Allowing the providers' case to proceed under the Supremacy Clause to enforce § 30(A) in the absence of Congressional authorization for the suit puts the Supremacy Clause to the wrong use. It is not a "source of any federal rights." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979); *Golden*

State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 (1989); *see also Independent Living*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (purpose of Supremacy Clause is "to ensure that, in a conflict with state law, whatever Congress says goes."). The Ninth Circuit's holding in this case rests on a reading of this Court's cases that is too broad to support it. *First*, the court of appeals' reliance on *Shaw v. Delta Air Lines* mistakes a right of action for jurisdiction. The footnote the court of appeals cited in this case addressed subject-matter jurisdiction, not the question whether there was a right of action. Federal subject-matter jurisdiction is a different thing than a right of action. Jurisdiction is, of course, jurisdictional; a cause of action is not. *See Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."), *quoting Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Second, the other cases the court of appeals relied on all arose in a context unlike that present here. *See Independent Living Ctr. of S. Cal. v. Shewry*, 543 F.3d at 1055-56, *citing Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) (state statute regulating size, design, and movement of oil tankers in Puget Sound); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (state law regulating occupational safety and health matters for hazardous-waste site workers);

Pac. Gas & Elec. Co. v. State Energy Res. Comm'n & Dev. Comm'n, 461 U.S. 190 (1983) (state laws limiting construction of nuclear power plants); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state law prohibiting transportation or sale of avocados within California according to a certain oil content).

Those cases presented state action that interfered with the plaintiffs' conduct that was, by federal law, either permitted or properly free of state regulation. They concerned, in other words, "the preemptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (Kennedy, J., concurring) (citations omitted). But in this case, like in *Independent Living*, the Medicaid providers are not threatened with any enforcement action; the providers instead seek to enforce a federal statute in a manner that Congress did not authorize. *See Independent Living*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (providers' and beneficiaries' challenges to rate cuts are unlike cases where plaintiffs are subject to or threatened with enforcement proceeding as in *Ex parte Young*, 208 U.S. 123 (1908)); *see also Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 675 (2003) (Scalia, J., concurring in the judgment) ("[T]he remedy for the State's failure to comply with the obligations it has agreed to undertake in the Medicaid Act is set forth in the Act itself: termination of funding by the Secretary of the Department of

Health and Human Services. . . ") (citations omitted); *id.* at 683 (Thomas, J., concurring in the judgment) (noting "serious questions as to whether third parties may sue to enforce Spending Clause legislation – through preemption or otherwise") (citation omitted). The Supremacy Clause supplies a rule of decision, not a right of action.

II. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER STATE MEDICAID REIMBURSEMENT RATES MUST BE BASED ON "RESPONSIBLE COST STUDIES" AND "SUBSTANTIALLY REIMBURSE PROVIDERS THEIR COSTS" AND TO DECIDE WHAT ROLE BUDGETARY FACTORS MAY PLAY IN MAINTAINING RATES.

Section 30(A) aims to ensure that in exchange for federal money, states will establish efficient and economical programs under which quality care is available at a reasonable price without enabling unnecessary utilization. The delivery of services in a manner consistent with § 30(A) is driven by myriad demographic, geographic, and economic forces. Thus, the methods and procedures a state uses to achieve that statute's goals are largely left to the states and CMS to work out.

The Ninth Circuit has added a few of its own things to § 30(A)'s basic, broad requirement. With the decision below, the rule in the Ninth Circuit may be stated this way: (1) states are obligated, on an ongoing basis, to ensure that reimbursement rates

bear a reasonable relationship to provider costs; (2) rates must be based on "responsible cost studies" conducted by the state or someone else; and (3) where rates do not substantially reimburse providers their costs, a state may not decline to raise them solely because there is no money to do so. Providers are entitled, under the Ninth Circuit's rule, to an increase in rates so that rates *do* substantially reimburse providers their costs. This is the rule even if HHS did not require a state to conduct cost studies or to establish rates that bear a reasonable relationship to provider costs. It is the rule even if the court finds that that efficiency, economy, access, and quality are satisfied. It is reasonable to think that if there are no issues relating to efficiency, economy, quality, or access, the reimbursement rates are probably about right. But this is the rule nonetheless. *Cf. Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1247-49 (9th Cir. 2013) (deferring to CMS's interpretation of § 30(A) that cost studies were not required in APA challenge to CMS's approval of plan amendment).

1. The Ninth Circuit compounded its error in permitting the case to proceed under the Supremacy Clause by reaffirming and extending a rule on the merits that conflicts with every other circuit to have considered the question. *See Rite-Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999) ("Section 30(A) does not require any 'particular methodology.'"); *Methodist Hosps.*, 91 F.3d at 1030 ("Nothing in the language of § 1396a(a)(30)(A), or any implementing regulation, requires a state to conduct studies in

advance of every modification. It requires each state to produce a *result*, not to employ any particular methodology for getting there."); *Minn. HomeCare Ass'n, Inc. v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997) ("The Medicaid Act does not require the State to utilize any prescribed method of analyzing and considering [§ 30(A)'s] factors.").

The Ninth Circuit's decision is also at odds with the view taken by the Solicitor General at the petition stage in both *Orthopaedic Hospital v. Belshe* and *Independent Living*. In each, the Acting Solicitor General wrote that the Ninth Circuit's reading of § 30(A) is wrong: (a) § 30(A) contains no mandate that that Medicaid reimbursement rates cover "all or substantially all of the costs incurred by provider in order to ensure reasonable access to quality care" and (b) the Ninth Circuit's interpretation "frustrates Congress' purpose of giving States wide discretion to set Medicaid payments that are consistent with efficiency, economy, and access to quality care." Br. of United States as *Amicus Curiae, Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992 (2011) (No. 09-958), 2010 WL 4959708 at *9; *see* Br. of United States as *Amicus Curiae*, *Belshe v. Orthopaedic Hosp.*, 522 U.S. 1044 (1998) (No. 96-1742), 1997 WL 33561790 at **2-3. At the petition stage in *Independent Living*, the Acting Solicitor General stated that HHS was committed to a final rule by December 2011. 2010 WL 4959708 at *11. He recommended that the Court deny California's petition, in part for this reason, explaining that "[t]he nature and extent of the obligations imposed on States under Section

1396a(a)(30)(A) are best suited for expert agency consideration in the first instance." *Id.* Yet, no rule has been finalized, and so meanwhile, the Ninth Circuit's erroneous interpretation of the statute continues to drive numerous § 30(A) lawsuits and unnecessarily add significant administrative and financial obstacles to states' Medicaid programs.

2. Not only is the Ninth Circuit's decision inconsistent with three other circuits and with HHS, but the decision cannot square with the plain meaning of § 30(A). This Court has said "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted); *see also id.* ("When the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms") (citations and internal quotations omitted). The Ninth Circuit's decision fails on that score. Section 30(A) does not require cost studies to be conducted or considered when rates are set. It does not limit the role budgetary considerations may play when rates are set (or, as in this case, when a state decides *not* to raise rates). And it does not require rates to substantially reimburse providers their costs or bear a reasonable relationship to those costs. It surely does not require that rates be raised whenever there is some information that costs for a particular class of provider might have, in the aggregate, gone up.

Congress knows how to require that payments cover provider costs. One example is the Boren Amendment from 1988. That amendment to 42 U.S.C. § 1396a(a)(13)(A) required states to reimburse inpatient hospital, skilled nursing, and other institutional services providers with rates that were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502-503 (1990). The Boren Amendment has long since been repealed, 1997 Pub. L. No. 105-33, § 4711, 111 Stat. 507, but the fact that Congress chose in places to require states to cover costs and did not choose to do so in other places suggests the Ninth Circuit's rule conflicts with Congress' intent. *See Field v. Mans*, 516 U.S. 59, 67 (1995).

The Ninth Circuit's decision also imposes on states funding conditions that Congress did not intend and to which states never agreed. This cannot be reconciled with this Court's precedents. Spending Clause legislation "is much in the nature of a contract," and "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17 (citations omitted). The substantive requirements the Ninth Circuit has imposed, which must be met regardless of whether the statute's actual goals are achieved, conflict with this Court's clear view that "if Congress intends to impose a condition on the grant

of federal moneys, it must do so unambiguously." *Id.* (citations omitted).

3. The Ninth Circuit's rule frustrates Congress' goal of allowing states great flexibility in designing and administering their Medicaid programs in cooperation with HHS. It establishes the federal courts as a second regulatory body, whose requirements states must meet, even if CMS has not imposed those requirements. The Ninth Circuit's rule is inflexible, elevating provider costs above end goals of efficiency, economy, and access to quality care. In this regard, a scheme that reimburses provider costs may perpetuate inefficiencies. So a state may establish rates to comply with *Orthopaedic Hospital v. Belshe* only to have CMS deny a plan or waiver amendment or initiate a compliance action because in its judgment those rates will not achieve compliance with § 30(A). States may be forced to choose which penalty they want to risk: an injunction, or a loss of funding. This scenario "threaten[s] to defeat the uniformity that Congress intended by centralizing administration of the federal program in the agency and to make superfluous or to undermine traditional APA review." *Independent Living*, 132 S. Ct. at 1211.

The possibility of federal courts imposing obligations on states that are inconsistent with a state's agreement with CMS is made more likely by the Ninth Circuit's unpredictable approach to § 30(A). *Orthopaedic Hospital v. Belshe* involved rate reductions to hospitals, which are mandatory cost reporters. 42 C.F.R. § 447.253(f), (g). Residential habilitation

providers are not mandatory cost reporters, and so may not track costs in a reliable manner. Following *Orthopaedic Hospital v. Belshe*, the Ninth Circuit expanded the requirements to more (and presumably all) providers, and added further requirements. *See, e.g.*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010); *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010), *both vacated on other grounds sub nom. Douglas v. Indep. Living Ctr.* This case represents yet another erroneous expansion of the rule.

Even as it has expanded the requirements, the Ninth Circuit has not provided clear guidance to states about how to satisfy them. If budgetary concerns cannot be the sole factor in determining rates, what role can budgets play? Since the rule applies not just to rate reductions, but also to existing rates, how often must states conduct studies to make sure their existing rates substantially reimburse providers their costs? What does "substantially reimburse" mean? What is a "responsible" cost study? What level of statistical validity is required? What must the cost study include? Only the Ninth Circuit knows, and these answers will come only through unnecessary and expensive litigation that does not assure that the statute's ends are met.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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July 2, 2014

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC., Plaintiffs-Appellees, v. RICHARD ARMSTRONG; LESLIE CLEMENT, Defendants-Appellants.	No. 12-35382 D.C. No. 1:09-cv-00634-BLW MEMORANDUM* (Filed Apr. 4, 2014)

Appeal from the United States District Court
for the District of Idaho B. Lynn Winmill,
Chief District Judge, Presiding

Argued and Submitted December 2, 2013
Seattle, Washington

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: TALLMAN and BEA, Circuit Judges, and MURPHY, District Judge.**

Defendants-Appellants Richard Armstrong, the Director of Idaho's Department of Health and Welfare ("IDHW"), and Leslie Clement, an IDHW Deputy Director and former IDHW Division of Medicaid Administrator (collectively, "the Directors"), appeal the district court's grant of summary judgment in favor of Plaintiffs-Appellees, a group of agencies providing supported living services to Medicaid-eligible individuals in Idaho (collectively "the Providers"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review a district court's grant of summary judgment and its rulings on matters of statutory interpretation de novo. *See Newton-Nations v. Betlach,* 660 F.3d 370, 378 (9th Cir. 2011). Summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

The Providers have an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation. *See Indep. Living Ctr. of S. Cal. v. Shewry,*

** The Honorable Stephen Joseph Murphy, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

543 F.3d 1050, 1065 (9th Cir. 2008) ("Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law.").

Although the dissenting justices in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, J., dissenting), would have held otherwise, we remain bound by the prior holdings of the Supreme Court, and of our court, that have recognized a private right of action under the Supremacy Clause. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

Section 30(A) of the Medicaid Act requires that state Medicaid plans contain procedures to ensure that reimbursement rates for healthcare providers "are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to meet the need for care and services in the geographic area. 42 U.S.C. § 1396a(a)(30)(A). We have interpreted Section 30(A) to require that reimbursement rates bear a reasonable relationship to provider costs.[1] *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491,

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[1] The Directors call on us to abandon the requirements of *Orthopaedic Hospital*. Nonetheless, "[w]e are bound by circuit precedent unless there has been a substantial change in relevant circumstances, or a subsequent en Banc or Supreme Court decision that is clearly irreconcilable with our prior holding." *See United States v. Vasquez-Ramos*, 531 F.3d 987, 991 (9th Cir.

(Continued on following page)

1499 (9th Cir. 1997). Where rates fail to "substantially reimburse providers their costs," there must be some justification other than "purely budgetary reasons." *Id.* at 1499, 1499 n.3.

The Directors conducted yearly cost studies between 2006 and 2009, developed a new rate setting methodology, and recommended substantial increases in reimbursement rates for supported living services based on the cost study results. The Stipulated Facts provide that the Directors did not implement the proposed rate changes because the Idaho legislature did not appropriate the necessary funds. Because the reimbursement rates at issue fail to "substantially reimburse providers their costs," and because the Directors concede that the 2006 rates remained in place for "purely budgetary reasons," the district court did not err in granting summary judgment to the Providers.[2]

AFFIRMED.

2008) (internal citations omitted). Neither circumstance is present here.

[2] We express serious doubt over whether the Directors' inaction constitutes a "Thing" in state law that can be preempted under the Supremacy Clause. However, the Directors failed to make this argument to the district court and they did not raise the issue in their briefing to our court. Therefore, we deem the issue waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]n appellate court will not consider issues not properly raised before the district court. Furthermore, on appeal, arguments not raised by a party in its opening brief are deemed waived.").

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

INCLUSION, INC.; EXCEPTIONAL CHILD CENTER, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC., Plaintiffs, v. RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities, Defendants.	Case No. 1:09-cv-00634-BLW **JUDGMENT**

In accordance with the Memorandum Decision and Order (Dkt. 39) entered on December 12, 2011,

IT IS ORDERED, ADJUDGED AND DECREED THAT

1. Judgment is entered for Plaintiffs. The relative rights and obligations of the parties are as set out in that Memorandum Decision and Order (Dkt. 39).

2. Defendants shall implement immediately the reimbursement rates for Supported Living Residential Habilitation Services, as set out in and consistent

with that Memorandum Decision and Order (Dkt. 39).

3. The clerk is directed to close this case.

DATED: April 12, 2012

[SEAL] /s/ B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

INCLUSION, INC.; EXCEPTIONAL CHILD CENTER, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC., Plaintiffs, v. RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities, Defendants.	Case No. 1:09-cv-00634-BLW **MEMORANDUM DECISION AND ORDER**

Before the Court is Defendants' Motion for Reconsideration (Dkt. 40), Plaintiffs' Motion for Entry of Judgment (Dkt. 43) and Plaintiffs' Motion to Expedite (Dkt. 44). Having considered the parties' briefing and being familiar with the record, the Court will deny reconsideration and enter judgment, thus rendering moot the Motion to Expedite.

BACKGROUND

Plaintiffs are five Idaho corporations providing "residential habilitation" services to Medicaid eligible individuals in supported living settings in the state of

Idaho. *Stip. Facts,* Dkt. 28 at 2-3. Residential habilitation services help Medicaid participants to reside in the community by providing skills training, assistance with decision-making, socialization, mobility, and activities of daily living (e.g. eating, bathing). *Id.* Defendants are Richard Armstrong – Director of Idaho's Department of Health and Welfare (IDHW), and Leslie Clement – an IDHW Deputy Director and former IDHW Division of Medicaid Administrator. *Id.* at 2.

Plaintiffs filed this action seeking to enjoin changes to IDHW's reimbursement rates for service providers – such as Plaintiffs – arguing that the proposed rate changes violated state and federal law. The parties agreed the matter could be decided on stipulated facts, without need for a trial. After reviewing the Stipulated Facts and considering the parties' arguments, this Court granted summary judgment to Plaintiffs and against Defendants. *Memorandum Decision & Order,* Dkt. 39. Defendants now seek reconsideration of that decision, and Plaintiffs move for entry of judgment.

LEGAL STANDARD

A motion to reconsider an interlocutory ruling requires an analysis of two important principles: (1) error must be corrected, and (2) judicial efficiency demands forward progress. The former principle has led courts to hold that a denial of a motion to dismiss or for summary judgment may be reconsidered at any

time before final judgment. *Preaseau v. Prudential Insurance Co.,* 591 F.2d 74, 79-80 (9th Cir. 1979). While even an interlocutory decision becomes the "law of the case," it is not necessarily carved in stone.

Justice Oliver Wendell Holmes concluded that the "law of the case" doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson,* 225 U.S. 436, 444 (1912). "The only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous. There is no need to await reversal." *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568, 572 (N.D.Cal. 1981) (Schwartzer, J.). However, the need to be right must co-exist with the need for forward progress. A court's opinions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1988).

Reconsideration of a court's prior ruling under Federal Rule of Civil Procedure 59(e) is appropriate "if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." *S.E.C. v. Platforms Wireless Intl Corp.,* 617 F.3d 1072, 1100 (9th Cir. 2010) (citation omitted). Defendants here seek reconsideration under all three bases.

ANALYSIS

1. New Evidence

Defendants first argue that the Court should reconsider its decision based on newly discovered evidence: two errors in the parties' Stipulations of Fact, discovered after the stipulations were submitted to the Court; and previously unavailable data regarding bids by service providers for an emergency placement services contract. According to Defendants, the number of participants receiving supported living services, as stipulated by the parties, reflects a clerical error, and should have been much lower.[1] Defendants state that the stipulated rate for intense support services – $496.56 – is also incorrect, and should have been $413.82. *Pugatch Dec.*, Dkt. 40-3 ¶ 4. Defendants do not discuss how either error warrants reconsideration, except to note that the Court's decision "rests in part on" the incorrect data. *Def. Br.*, Dkt. 40-1 at 4. Defendants further argue that bids for an emergency placement services contract, unavailable before December 2011, also support reconsideration.

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[1] The Stipulated Facts note "[t]here are 6,202 participants receiving supported living services;" although no year is cited, the next sentence provides, "[a]s of the end of calendar year 2010 Plaintiffs submitted claims for supported living services for the following number of participants. . . ." *Stip. Facts*, Dkt. 28 at 7. Defendants now assert that there were 717 participants using supported living services as of September 30, 2011. *Pugatch Dec.*, Dkt. 40-3 ¶ 3.

The Court finds that the proffered new evidence fails to support reconsideration for three reasons. First, the errors in the parties' stipulated facts are not new; Defendants have not shown, nor do they argue, that the evidence was unavailable or could not have been discovered at the time the parties submitted stipulated facts to the Court. *Cf Lainez-Ortiz v. INS*, 96 F.3d 393, 400 (9th Cir. 1996) (requiring newly discovered evidence to have been previously unavailable, in order to warrant reopening proceedings). As to the bids for the emergency placement services contract, the Court finds such evidence immaterial to the costs and reimbursement rates for residential habilitation service providers.

Second, although Defendants cite a declaration from Sheila Pugatch (IDHW's Principal Financial Specialist), to support that the two stipulations are in error, there is no indication that Plaintiffs agree. Absent further proceedings or a stipulation by Plaintiffs, Defendants' "new evidence" is simply an unresolved issue of fact.[2]

Third, even if the parties had stipulated to the evidence now offered by Defendants, the Court's decision would be no different. It is undisputed that reimbursement rates for the relevant service providers

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[2] Defendants ask that the stipulated facts be corrected in the record, but such request is properly the subject of a separate motion to which Plaintiffs would be entitled to respond. The Court here will address the request for reconsideration only.

have remained unchanged since 2006. *Stip. Facts,* Dkt. 28 at 6. It is also undisputed that between 2006 and 2009, provider cost studies were done at the IDHW's request. *Id.* Most significantly, the parties agree that the rates have not been changed because the state legislature failed to appropriate funds to pay for the increases suggested by the cost studies. *Id.* The Court granted summary judgment to Plaintiffs because, as shown by these agreed facts, the current reimbursement rates fail to take into account actual provider costs.

The corrected number of participants would have no effect on the Court's analysis. The corrected figure for intense support services, although lower than the stipulated figure, is still well above – and thus unaccounted for in – the current rate. The Court will therefore deny reconsideration on the basis of newly discovered evidence.

2. Clear Error

Defendants' second basis for reconsideration is that the Court clearly erred in its analysis of *Orthopaedic Hospital v. Belshe,* 103 F.3d 1491 (9th Cir. 1997). Defendants' arguments are little more than an effort to take a second bite at the apple. Defendants attempt to distinguish *Belshe* – all but ignored in Defendants' summary judgment briefing – on its facts. The Court thoroughly examined and discussed *Belshe* in rendering its decision for Plaintiffs. The Court stands by that analysis now. Defendants having

failed to show clear error, the Court will deny reconsideration on that basis.

3. Change In Controlling Law

Defendants asked the Court to delay judgment until after the Supreme Court issued its decision in *Douglas v. Indep. Living Ctr.*, ___ S.Ct. ___, 2012 WL 555204 (2012). That case was decided on February 22, 2012, thus the request to postpone judgment is moot. As Plaintiffs correctly observe, the Supreme Court's decision in *Douglas* did not alter *Belshe*, or this Court's decision here. Given the procedural posture in *Douglas*, the Supreme Court remanded to the Ninth Circuit to address whether a plaintiff may bring a Supremacy Clause challenge where the allegedly non-compliant state law has been approved by the federal Centers for Medicare & Medicaid Services. The action before this Court does not challenge a state statute, let alone a state statute approved by the designated federal agency. Instead, it challenges the IDHW's compliance with state and federal law. There being no relevant change in controlling law, the Court will deny reconsideration on that basis as well.

4. Entry of Judgment

The Supreme Court having decided *Douglas*, there is no basis to delay entry of judgment here. Plaintiffs submitted a proposed judgment. Other than to request that the Court delay entry, Defendants

have not objected nor otherwise responded with an alternate proposal. The Court finds Plaintiffs' proposed form appropriate and in accordance with the Court's Memorandum Decision and Order (Dkt. 39), and will thus enter judgment consistent with Plaintiffs' proposal, to be filed concurrently herewith.

ORDER

IT IS ORDERED THAT:

1. Defendants' Motion for Reconsideration (Dkt. 40) is DENIED.

2. Plaintiffs' Motion for Entry of Judgment (Dkt. 43) is GRANTED. Judgment will be entered separately.

3. Plaintiffs' Motion to Expedite (Dkt. 44) is DENIED as MOOT.

DATED: April 12, 2012

[SEAL] /s/ B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

INCLUSION, INC.; EXCEPTIONAL CHILD CENTER, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC., Plaintiffs, v. RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities, Defendants.	Case No. 1:09-cv-00634-BLW **MEMORANDUM DECISION AND ORDER**

Before the Court are cross Motions for Summary Judgment by Plaintiffs (Dkt. 29) and Defendants (Dkt. 30). As memorialized in Docket Entry Order 27, the parties agreed that this case can be resolved on stipulated facts in lieu of a bench trial. The parties submitted Stipulated Facts (Dkt. 28) and briefing, and the Court heard oral argument on October 31, 2011. Having fully considered the parties' written and oral arguments, and being familiar with the record, including stipulated facts, the Court will grant summary judgment as to Plaintiffs, and deny summary as to Defendants, as more fully expressed below.

BACKGROUND

Plaintiffs are five Idaho corporations providing "residential habilitation" services to Medicaid eligible individuals in supported living settings in the state of Idaho. *Stip. Facts* at 2-3, Dkt. 28. Residential habilitation describes an array of services designed and provided to assist Medicaid participants in residing successfully in the community. *Id.* at 3. Such services include, but are not limited to, skills training, and assistance with decision-making, money management, socialization, mobility, and behavior shaping or management, as well as grooming, bathing, eating, administering medications, meal preparation, laundry, shopping and the like. *Id.* Services may also include skills training for family and non-family caregivers for participants. *Id.*

Defendants are Richard Armstrong – Director of Idaho's Department of Health and Welfare (IDHW), and Leslie Clement – an IDHW Deputy Director and former IDHW Division of Medicaid Administrator. *Id.* at 2. Clement has had the responsibility of administering and operating Idaho's Medicaid program under the direction and supervision of Armstrong at all times relevant to this case. *Id.*

Medicaid is a cooperative federal-state program that directs federal funding to participating states to provide medical assistance to "families with dependent children, [and] aged, blind and disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."

42 U.S.C. § 1396-1; *Stip. Facts* at 2. States that choose to participate in the Medicaid program – including Idaho – must comply with the requirements of the Medicaid Act, which includes development of a state plan. 42 U.S.C. § 1396a(a). The state plan must be approved by the Federal Center for Medicaid and Medicare Services (CMS). 42 C.F.R. § 430.10.

In 1981, Congress passed amendment § 1915(c) "in response to studies showing that many persons residing in Medicaid-funded institutions would be capable of living at home or in the community if additional support services were available." *Sanchez v. Johnson,* 416 F.3d 1051, 1054 (9th Cir. 2005). Under the amendment, CMS can waive certain Medicaid Act requirements where a state demonstrates that the cost of caring for an individual in a home and community based program would be less than or equal to the cost of providing institutional care. *Id.* Idaho has been approved by CMS for three waiver programs, including the Developmentally Disabled Home and Community Based Services Waiver (DD Waiver). *Stip. Facts* at 2. The services provided by Plaintiffs in this case are pursuant to Idaho's DD Waiver. *Id.* at 3.

Effective October 1, 2004, the IDHW established reimbursement rates for two separate levels of care – "high support," and "intense support." *Id.* On July 1, 2006, based on onsite observations and a survey of residential habilitation agencies, those rates (see table below) increased slightly. *Id.*

In 2005, Idaho's Legislature passed Idaho Code § 56-118, requiring the IDHW to "implement a methodology for reviewing and determining reimbursement rates" for Medicaid services that incorporates providers' actual costs of providing services. I.C. § 56-118(1), (2). In response, the IDHW contracted Johnson, Villegas-Grubb and Associates (JVGA) to conduct applicable studies. *Stip. Facts* at 4. JVGA's efforts were overseen by Sheila Pugatch, Principal Financial Specialist at IDHW, who manages the Office of Reimbursement Policy and has primary responsibility for setting Medicaid reimbursement rates in Idaho. *Id.* at 6.

JVGA surveyed Medicaid providers regarding the cost of providing services. *Id.* at 4. Based on its survey, JVGA submitted a report to the Idaho Legislature on November 30, 2006, recommending increases in reimbursement rates. JVGA continued to conduct studies, and in 2009, the IDHW submitted revised proposed rates that reflected further analysis. The current rates (implemented in July 2006), as well as those based on JVGA's surveys are set forth as follows:

	Current rate, effective July 1, 2006	JVGA rate proposed November 30, 2006	IDHW rate proposed in 2009
Daily Rate – High Support	$225.32	$228.48	$248.40
Daily Rate – Intense Support	$268.36	$342.72	$496.56

Despite, the proposed amendments based on JVGA's studies, the IDHW has not changed the reimbursement rates implemented in July 2006. According to Pugatch, the rate changes proposed in 2009 would have increased Idaho's Medicaid expenditures by $4 million. *Id.* at 6. Because Idaho's Legislature did not appropriate the necessary funds, the IDHW did not implement the proposed rate changes. *Id.* at 6. Thus, the current reimbursement rates are not based on the cost studies performed by JVGA between 2006 and 2009. *Id.* at 6.

There are currently 61 residential habilitation agencies, such as Plaintiffs, in Idaho. *Id.* at 7. There are 6,202 participants receiving supported living services. *Id.* Services covered by the DD Waiver are readily available to eligible participants; there are no waiting lists for any Medicaid services in Idaho. *Id.* The IDHW Critical Incident and Complaint Data Base, used to track Medicaid benefits and services complaints, including complaints related to access to services, shows no unresolved complaints for supported living services. *Id.* Neither plaintiff agency has turned away a prospective client based on an inability to afford providing them supported living services. *Id.*

LEGAL STANDARD

Plaintiffs challenge the IDHW's compliance with the Medicaid Act, and seek prospective and injunctive relief. Where a movant shows "there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law," the court shall grant summary judgment in favor of the movant. Fed. R. Civ. P. 56(a). The parties in this case have stipulated to all relevant facts and filed cross motions for summary judgment, arguing that each is entitled to judgment as a matter of law. The Court now applies the relevant law to the stipulated facts before it.

ANALYSIS

The federal statutory provision at issue here is "§ 30A" of the Medicaid Act. Under that provision, participating states must set forth in their state plan, a process for the use of, and payment for, Medicaid Plan services. 42 U.S.C. 1396a(a)(30)(A). The plan should prevent unnecessary use of care and services, and ensure that payments "are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to meet the need for care and services in the geographic area. *Id.*

The Ninth Circuit has interpreted § 30A as having both "substantive and procedural requirements." *Indep. Living Center v. Maxwell-Jolly,* 572 F.3d 644, 651 (9th Cir. 2009). Substantively, the agency administering its state's Medicaid program must set reimbursement rates "that bear a reasonable relationship to efficient and economical costs of providing quality services." *Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1496 (9th Cir. 1997). To accomplish this, the agency must perform and "rely on

responsible cost studies that provide reliable data as a basis for its rate setting." *Indep. Living Center,* 572 F.3d at 651. Where rates fail to "substantially reimburse providers their costs," there must be some justification other than "purely budgetary reasons." *Belshe,* 103 F.3d at 1499 n.3 (citing *Beno v. Shalala,* 30 F.3d 1057, 1069 (9th Cir. 1994)).

Ninth Circuit cases addressing alleged violations of § 30A have involved changes to reimbursement rates or methodologies, not maintenance of existing rates. *Cf Indep. Living Ctr. v. Shewry,* 543 F.3d 1047 (9th Cir. 2008); *Indep. Living Ctr. v. Shewry,* 543 F.3d 1050 (9th Cir. 2008); *Indep. Living Ctr. v. Maxwell-Jolly,* 572 F.3d 644; *Indep. Living Ctr. v. Maxwell-Jolly,* 590 F.3d 725 (9th Cir. 2009); *Cal. Pharmacists Ass'n v. Maxwell-Jolly,* 596 F.3d 1098 (9th Cir. 2010); *Dominguez ex rel. Brown v. Schwarzenegger,* 596 F.3d 1097 (9th Cir. 2010); *Indep. Living Ctr. v. Maxwell-Jolly,* 374 Fed.Appx. 690 (9th Cir. 2010). Indeed, this Court has addressed the validity of a reimbursement rate reduction, and rejected the rate change based on the IDHW's failure to rely on responsible cost studies. *Unity Service Coordination, Inc. v. Armstrong,* 2011 WL 864472 (D. Idaho, March 10, 2011).

Here, Plaintiffs do not challenge the propriety of a rate change action. Instead, they challenge the IDHW's inaction, or failure to amend existing reimbursement rates. The IDHW set rates in July 2006 based on "onsite observations of participants" and a survey of residential habilitation agencies. *Stip. Facts,* Dkt. 28 at 4. But subsequent studies, performed at

the IDHW's request, reveal that actual provider costs exceed the 2006 rates.

The IDHW highlights that there are no unresolved complaints regarding care for supported living clients. Also, Plaintiffs Inclusion and Exceptional Child Center have never turned away a client based on the cost of providing services. Given these stipulated facts, the record would appear to support that current rates are "consistent with efficiency, economy, and quality of care," as discussed by the Ninth Circuit in *Belshe,* 103 F.3d at 1496. However, the court in *Belshe* went on to say that "[provider] costs are an integral part of the consideration" that cannot be ignored. *Id.* at 1496-99.

Thus, to fulfill the substantive requirements of § 30A, a state agency must consider actual provider costs. To satisfy § 30A's procedural requirements, the IDHW cannot set rates based on responsible cost studies, then disregard undisputed evidence of increasing costs from studies completed in subsequent years.

The Court is reluctant to become entangled in the management of state government. Also, the Court is mindful that an order requiring the IDHW to amend its reimbursement rates will not cause requisite funding to appear; the ruling may in fact force the IDHW to reallocate funds from other programs. But the law is clear that budgetary concerns cannot form the sole basis for reimbursement rates. *Belshe,* 103 F.3d at 1499. The Court need not wait for

evidence of low quality care or insufficient access to services before intervention is warranted.

In supplemental briefing provided at the Court's request, the parties note that the Ninth Circuit stands alone in finding that § 30A includes procedural requirements to achieve economy, efficiency, access, and quality. *See Methodist Hospitals, Inc. v. Sullivan,* 91 F.3d 1026, 1030 (7th Cir. 1996); *Minnesota Homecare Assn. v. Gomez,* 108 F.3d 917, 918 (8th Cir. 1997); *Rite Aid of Penn., Inc. v. Houston,* 171 F.3d 842, 851 (3rd Cir. 1999); *Conn. Assn. of Health Care Facilities, Inc. v. Rell,* 395 Fed.Appx. 741, 742-43 (2d Cir. 2010). However, the United States Supreme Court denied a petition for writ of certiorari on this issue in the Ninth Circuit's decision in *Belshe. Belshe v. Orthopaedic Hosp.,* 522 U.S. 1044 (1998). Despite the positions taken by other circuits, the Ninth Circuit's clear holding in *Belshe* remains the controlling authority for the Court here.

Although the Supreme Court's recent grant of certiorari in *Indep. Liv. Ctr. v. Maxwell-Jolly,* 131 S.Ct 992 (2011), raises some question as to the long-term viability of the Ninth Circuit's holding in *Indep. Liv. Ctr. of So. Cal v. Shewry,* 543 F.3d 1050, 1065 (9th Cir. 2008), that development does not appear to have any direct significance here. In *Shewry,* the Ninth Circuit held that providers have standing under the Supremacy Clause to challenge a state law reducing reimbursement rates, as preempted by § 30A. On that issue, the Eleventh Circuit stands apart from a majority of sister circuits, including the Ninth Circuit,

which agree that provider standing exists. With this backdrop, the Court finds no reason to stay its decision here. Again, the Ninth Circuit's position is clear, and controls the outcome as discussed above.

The Court will therefore grant Plaintiffs' motion for summary judgment, and deny Defendants' motion for summary judgment.

ORDER

IT IS ORDERED THAT:

1. Plaintiffs' Motion for Summary Judgment (Dkt. 29) is **GRANTED**.

2. Defendants' Motion for Summary Judgment (Dkt. 30) is **DENIED**.

DATED: December 12, 2011

[SEAL] /s/ B. Lynn Winmill
B. Lynn Winmill
Chief Judge
United States District Court

No. 14-15

Supreme Court, U.S.
FILED
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RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

None of the corporations who were Plaintiffs-Appellees below, and who are Respondents herein, has a parent corporation, and no public corporation owns any stock in these corporations.

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STATEMENT OF THE CASE

Medicaid is a joint state-federal program to provide needed medical care to the poorest of America's citizens. *Douglas v. Indep. Liv. Ctr.*, 132 S.Ct. 1204, 1205 (2012). As set out in the petition, Medicaid encompasses a variety of services offered via state plans and "waivers" specifically permitted by statute. 42 U.S.C. §1396n. Waiver applications set out the detailed methods by which a state will provide services such as home and community based services and residential habilitation for developmentally disabled Medicaid participants. 42 U.S.C. §1396n(c). Residential habilitation, the service at issue in this case, prevents the institutionalization of developmentally disabled adults by providing skills training, assistance with decision-making, socialization, mobility, and various other activities of daily living which the Medicaid participants would otherwise be unable to perform, and doing so in the community rather than a hospital. Pet. App. 8.

The Idaho Department of Health and Welfare last voluntarily adjusted its reimbursement rates for residential habilitation services in supported living environments in 2006. Pet. App. 17. During the period leading up to 2009, the State had undertaken, pursuant to state law, a lengthy process to change the way in which it would calculate such reimbursement rates. App. 18; Idaho Code §56 118. That process resulted in proposed waiver amendments being submitted to CMS to incorporate the new reimbursement rate methodology. Pet. App. 18-19.[1]

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1. The District Court's Decision is not entirely clear on this point, but was based upon the Stipulated Facts submitted by the parties, which specified that the State had sought CMS

Title XIX of the Social Security Act creates the Medicaid program and requires, among other things, that in order for a State Medicaid Plan to receive federal funding it must provide rates that are "consistent with efficiency, economy, and quality of care" and sufficient to ensure access to that care. 42 U.S.C. §1396a(a)(30)(A) (hereafter "Section (a)(30)(A)"). While it is generally true that the State of Idaho's DD waiver does not include specific rates for services (See Pet. 7), there is no other evidence of whether Director Armstrong did or did not seek approval of the actual rates at issue in this case, either the pre-existing rates from the 2006 rate adjustment, or the rates ordered implemented by the District Court in April, 2012. Pet. App. 5-6. It was conceded by the Director, however, that for "purely budgetary reasons," he did not implement the rates generated by the new rate setting methodology, which was submitted to CMS. Pet. App. 4.

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approval for waiver amendments incorporating the new rate-setting methodology. The parties stipulated to the facts in the case based on counsels' understanding of what facts would be relevant to a final determination of the issues in the case, which was in turn based on the law as it existed at the time of the stipulation. The stipulation was entered prior to this Court's decision and opinions in *Douglas*, and thus did not address what action CMS took on the proposed amendment. Director Armstrong, however, publishes the current, approved wavier, on the website of the Idaho Department of Health and Welfare. The current approved waiver includes the language establishing the rate setting methodology for residential habilitation services based on cost studies and surveys. *Application for a 1915(c) Home and Community Based Services Waiver*, http://healthandwelfare.idaho.gov/Portals/0/Medical/DD%20Waiver.pdf (last visited August 21, 2014), p. 163.

Neither providers, such as the Plaintiffs here, nor participants have any method available to them to seek a determination by CMS of whether a plan complies with the statutes or regulations. CMS provides a detailed procedure by which the agency can initiate and pursue a compliance proceeding, 42 CFR §§430.60-430.104. Those procedures apply, however, only if CMS has itself decided that there is an issue of noncompliance. 42 CFR §§430.35, 430.60.

In the absence of any method to seek CMS review of alleged noncompliance, and in the face of Director Armstrong's failure to actually implement the rate-setting methodology set out in the waiver amendment, Plaintiffs here brought an action in the District Court. That action alleged that the failure of Director Armstrong to undertake cost studies which would justify existing rates, as well as failing to base rates on any but budgetary considerations rendered the rates inconsistent with federal law and thus preempted.

The case below, as argued and decided by the District Court, focused on the Defendants' failure to update the 2006 rate, despite the development and submission to CMS of a new rate setting methodology following extensive studies of the costs of providing services, and a determination that the new methodology should result in substantial rate increases. Pet. App. 21-22. The District Court held that even inaction by the state, if it resulted in "actual provider costs exceed[ing] the [established] rates" violated Medicaid, particularly where, as here, budgetary concerns formed "the sole basis for reimbursement rates." Pet. App. 22.

In the Circuit Court, the nature of the underlying state conduct was recast as an issue of whether the

State's conduct, what it argued was its inaction, actually "constitutes a 'Thing' in state law that can be preempted under the Supremacy Clause." Pet. App. 4, n. 2. The Circuit Court panel expressed "serious doubt" about whether it was, but concluded that the issue had been waived because it was not raised by the Defendants in the District Court. *Id.*

Relying solely on existing law in a brief, *per curiam*, memorandum opinion, the Circuit Court determined that a cause of action existed under the Supremacy Clause to challenge allegedly preempted state law, and that Section (a)(30)(A) required that where reimbursement rates did not fully cover the costs of service, there must be some basis for that failure other than a purely budgetary one. Pet. App. 4. The Circuit Court affirmed the judgment, and Petitioners have not sought rehearing or rehearing *en banc* despite the Circuit Court panel's statement that only an *en banc* panel could overturn existing law as the petitioners requested. Pet. App. 3, n. 1.

Petitioners did not at any time seek a stay of execution pending appeal. As a result, the rates calculated in reliance on the CMS-approved methodology have been in place since the District Court's judgment of April 12, 2012. Pet. App. 5-6.

REASONS THE PETITION SHOULD BE DENIED

I. THE PETITION SHOULD BE DENIED AS TO BOTH QUESTIONS PRESENTED BECAUSE THE STIPULATED FACTS ARE TOO LIMITED TO ALLOW REASONED CONSIDERATION OF THE SIGNIFICANT CHANGES IN THE LAW PETITIONERS PROPOSE.

While the adage that "hard cases make bad law" is well-worn, it is more likely true that poorly developed facts make for bad law. The parties here entered into stipulated facts on which cross-motions for summary judgment were based, in lieu of completing a trial to develop the facts. Pet. App. 8. That stipulation necessarily pre-dated the District Court's Memorandum Decision and Order which was issued December 12, 2011. Pet. App. 24. That stipulation, now over three years old, failed to address facts which this Court and the Circuit Court has only recently determined should be considered if there is to be a significant change in either the law under the Supremacy Clause or the construction lower courts are to give to Section (a)(30)(A).

The parties did not enter into any detailed stipulations, or present any other evidence addressing the manner in which Idaho's reimbursement rates are actually implemented. Although the parties stipulated that reimbursement rates had been changed in 2006 and had not changed since then, their stipulation did not address how the Defendants went about actually implementing and applying reimbursement rates. The lack of factual development became a problem in consideration of the preemption question when the Circuit Court panel began to question whether the implementation of a reimbursement

rate constituted a "Thing in the Constitution or Laws" of the state within the meaning of the Supremacy Clause. U.S. Const. Art. VI, Cl. 3. While that issue was deemed waived by the Circuit Court, the issue of just how reimbursement rates are implemented would remain an unaddressed but relevant fact in this case, if this Court were to inquire into the existence of a Supremacy Clause based cause of action.

The majority in *Douglas* faced the reality that because CMS had spoken in the intervening period from when the suits were filed to the time of that decision, "the relevant circumstances [had] changed." *Douglas v. Indep. Liv. Ctr.*, 132 S.Ct. 1204, 1207. Although CMS' decision did "not change the underlying substantive question, namely whether California's statutes are consistent with a specific statutory provision," it did have at least the potential to "change the answer." *Id.*, at 1210. Without determining precisely what effect CMS's decision had, the majority held that its "decision carries weight." *Id.* at 1210. What weight it carried was a question to be decided, in the first instance by the lower courts, a question which has not yet been fully answered there, and which was not answered at all in the instant case.

The dissent in *Douglas* recognized implicitly that CMS's position mattered, though it would not have granted it dispositive effect on the question whether a Supremacy Clause based cause of action exists. Nonetheless, in discussing the nature of Spending Clause legislation and its relationship to state action, the dissent recognized that "under the Spending clause [States] agree only to conditions clearly specified by Congress," and the lower courts have "equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule,

rather than contravening it." *Douglas*, at 1213 (Roberts, C.J., dissenting). The dissent did not specifically address whether a Spending Clause based statute could give rise to a Supremacy Clause based cause of action if, in fact, that cause of action "gives effect" to federal authority as expressed by an agency responsible for its implementation, for the simple reason that such a set of facts was not before the Court at that time.

In the Social Security Act, Congress clearly specified that state plans and waivers must be approved by CMS, 42 U.S.C. §§1396b(a), 1396n(b). Whether the States have agreed to details that go beyond the express statutory requirements, and whether the lower courts can use their equitable powers to enforce a particular construction of the statute might be informed, post-*Douglas*, by whether CMS has clearly spoken on the issue and, thus, whether the state has agreed to such construction. But that part of the analysis is impossible on the record in this case.

The parties stipulated that after developing a new method of setting reimbursement rates for services provided under the DD waiver, the State of Idaho sought CMS approval of that methodology. Pet. App. 18-19.[2] The parties did not stipulate, however, whether or how such approval was granted. *Douglas* was issued in 2012, well after the stipulation of facts was entered in this case. Neither party supplemented the record, and thus the status of Idaho's waiver amendment, and how or on what terms it

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2. The stipulation was entered at a time when the law of the Ninth Circuit was clear and unchallenged on these issues. If the same case were in the District Court today, there can be little doubt that the factual record would be considerably more extensive, and would address these issues.

was approved, is not a matter of evidentiary record in this case. Furthermore, the effect, if any, of CMS's ultimate approval of that methodology was never addressed by the District Court, because at the time, that fact was not deemed relevant. If *certiorari* were granted here, this case would likely suffer the same fate as the cases that were consolidated and decided by *Douglas*, resulting in a remand which would do nothing to advance or resolve the state of the law on these issues.

As to the second question presented, the undeveloped factual record prevents the parties and this Court from determining whether CMS approval of the rate-setting methodology at issue herein would affect the preemption analysis under 42 U.S.C. §1396a(a)(30)(A). Subsequent development of the law in the Ninth Circuit indicates that it could.

After the remand in *Douglas* a separate panel of the Ninth Circuit decided *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013). In *Managed Pharmacy Care* the Court found it owed deference to a CMS decision to approve a State Plan Amendment ("SPA").716 F.3d at 1248.[3] The factual record, though adequate at the time the

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3. In the present case, there was no SPA, since the services in question are available and reimbursed under Medicaid solely as the result of a waiver under 42 U.S.C. §1396n(b). Idaho thus did not submit a SPA concerning the rate setting methodology, rather it submitted a request for a waiver amendment. Although *Managed Pharmacy Care* establishes that deference is owed to a SPA, it does not address waiver amendments. The deference owed to either is likely the same, but the matter has not been given serious scrutiny, and a proper factual record might be necessary in order to do so. *See, Skidmore v. Swift & Co., Inc.*, 323 U.S. 214

District Court's decision was made, would leave the Court guessing as to the role agency deference should play in this case. Even assuming that a waiver amendment receives the same deference as a SPA, there is no record in this case to show what exactly CMS approved or how it approved it. Respondents suggested below that CMS's approval of the rate setting methodology required the courts to enforce that methodology, but neither the District Court nor the Court of Appeals addressed the issue, deciding the case on much narrower grounds that were all the record supported. Since those same narrow grounds are all the factual record permits, the petition for *certiorari* should be denied.

Because of this unique factual record, the instant case is a poor choice of vehicles to develop rules of law. A decision in this case would simply leave future potential litigants wondering whether CMS approval was a necessary prerequisite to a Supremacy Clause based case, whether it was a death knell for such a case, or if it mattered at all.

(1944) (degree of deference owed depends on thoroughness, validity and consistency of reasoning behind the agency's decision).

II. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE THE ALLEGED SPLIT AMONG THE CIRCUITS IS WHOLLY ONE-SIDED, MAY SIMPLY RESOLVE ITSELF AND, IF IT DOES NOT, WOULD BENEFIT FROM FURTHER DEVELOPMENT IN THE LOWER COURTS.

The Petitioners assert that review is needed to resolve a circuit split. Pet. 14. The split is an extremely recent development, and one in which a single circuit disagrees with nearly every other circuit, and does so almost solely on the basis of a prior dissenting opinion of this Court. While a more genuine split among the circuits may arise, the split on which Petitioners and *amici* rely herein would actually benefit from further development before this Court weighs in.

A. For Many Years the Courts of Appeal Reached The Same Conclusion as That Reached by the Court Below, Resulting in a Nearly Unanimous Consensus that the District Courts Had Jurisdiction and Power to Decide Claims of Federal Preemption of State Law.

Prior to a decision by the Tenth Circuit earlier this year, nearly every Circuit Court of Appeals concurred in the Ninth Circuit's holding that a federal court may resolve the merits of a claim for injunctive and declaratory relief that a state law is preempted.

This relative unanimity was the product of this Court's preemption decisions, such as *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635

(2002). *Verizon* clearly established that a statutory cause of action is not needed for a preemption claim, and was merely the result of a long line of preemption cases that implicitly so held. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Gade v. Nat'l Solid Waste Mgmt. Assoc*, 505 U.S. 88 (1992); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n.*, 461 U.S. 190 (1983); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

From these cases, nearly every circuit reached the same conclusion. *Planned Parenthood of Houston v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *PhRMA v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Local Union No. 12004 v. Massachusetts*, 377 F.3d 64 (1st Cir. 2004); *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003); *Ill. Assn. of Mortgage Brokers v. Office of Banks & Real Estate*, 308 F.3d 762 (7th Cir. 2002): *St. Thomas-St. John Hotel& Tourism Ass'n. v. Virgin Islands*, 28 F.3d 232 (3rd Cir. 2000); *Village of Westfield v. Welch's*, 170 F.3d 116 (2ndCir. 1999); *First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775 (8th Cir. 1990).

Indeed, even the Tenth Circuit has held that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266 (10th Cir. 2004).

B. Only the Tenth Circuit Court of Appeals Has Diverged From This Consensus, and Has Done so Only in Limited Circumstances.

In *Douglas*, the Chief Justice's dissent, joined by three others Justices, questioned whether Spending Clause legislation, in particular, should support an independent right of action where Congress itself had not chosen to create such a right. To date, only the Tenth Circuit has taken up the implied invitation to reconsider Supremacy Clause jurisprudence on this basis.

In *Planned Parenthood of Kan. and Mid-Missouri v. Moser*, 747 F.3d 814 (10thCir. 2014), the plaintiff challenged a Kansas law which restricted the distribution of federally funded grants under Title X of the Public Health Service Act. The Kansas law would have limited such grants to "public entities, hospitals, and federally qualified health centers that provide comprehensive primary and preventative healthcare services." *Moser*, 747 F.3d at 816. The Tenth Circuit described the relevant provisions of the Public Health Service Act as "relatively sparse, consisting of just a few short provisions." *Id.*, at 818. The preemption claim thus relied extensively on regulations adopted by the federal Department of Health and Human Services. *Id.*

Although a lower court had found that the Kansas law was inconsistent with Title X and thus preempted, the Tenth Circuit held that even if that were true, the plaintiff lacked a cause of action from which the courts could fashion a remedy. *Id.*, at 823-824. Because such a holding potentially ran afoul of established circuit precedent including *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) and *Qwest Corp. v. City of Santa Fe*,

New Mexico, 380 F.3d 1258, the panel deciding *Moser* adopted a complicated and narrow rule:

> We hold only that when actual or threatened state action is allegedly contrary to a federal statute, the Supremacy Clause does not necessarily (it is a matter of statutory interpretation that depends on the specifics of the federal statute) authorize an injunction against the state action when four conditions are all satisfied: (1) the statute does not specifically authorize injunctive relief, (2) the statute does not create an individual right (which may be enforceable under 42 U.S.C. §1983), (3) the statute is enacted under the Constitution's Spending Clause, and (4) the state action is not an enforcement action in adversary legal proceedings to impose sanctions on conduct prohibited by law.

747 F.3d 814, 817.

Thus, the Petitioners and *amici* assert, there is a conflict between several decades' worth of preemption decisions in at least eleven circuits and this Court, and a five month old decision holding that in extremely limited circumstances, defined by at least four individual criteria (and arguably a fifth turning upon statutory construction), one circuit will limit the power of the district courts to pass upon the preemptive effect of Spending Clause statutes. While such can technically be described as a "split" among the circuits, it is not the type that will result in considerable differences in applicable law between different regions of the nation. It is difficult to imagine that such a "split" would challenge either the courts or the legislative branch in

either accomplishing or decreasing any particular degree of uniformity across state lines.

C. There Has Been Insufficient Time For the Law on this Issue to Develop.

Since this Court's opinion in *Douglas*, issued in 2012, *Moser* is the only case to take up the *Douglas* dissent's invitation to reconsider or abandon the long line of cases permitting Supremacy Clause based challenges to state laws. *Moser's* complex and detailed exception to general Supremacy Clause jurisprudence would benefit from additional applications in the lower courts to determine whether it is viable and can be fairly and consistently applied. The other decisions cited by Petitioner Armstrong and the *amici* do not demonstrate a split among the circuits, but instead demonstrate the kind of robust consideration that lower courts should be encouraged to engage in as prelude to an ultimate decision by this Court.

Moser, discussed above, stands alone for the proposition for which it stands. No other circuit has followed it. The Seventh Circuit has expressly chosen not to do so. Over time, the Tenth Circuit's approach in *Moser* may win converts, it may be modified and refined as its rule is deemed too narrow or not sufficiently narrow, or fatal flaws in its reasoning may justify its abandonment. But to date, the issue has simply not seen sufficient development in the lower courts to call for this Court's final decision.

In *Planned Parenthood of Indiana v. Ind. Dept. of Health*, 699 F.3d 962 (7th Cir. 2012), a panel of the Seventh Circuit expressly declined to decide whether a cause of action existed because the question was not jurisdictional. 699 F.3d 962, 983 ("Because our jurisdiction is not at issue,

we can assume without deciding the right-of-action question and proceed directly to the merits.") That the question is not jurisdictional is itself telling. Jurisdiction by definition is "the power of a court to decide" a question put before it. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947)(Frankfurter, J., concurring); *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, 94 (1998) *quoting Ex Parte McCardle*, 74 U.S. 506, 514 (1869). The Seventh Circuit has definitively not joined the Tenth Circuit in rejecting the power of the district courts to enjoin and declare preemption of state laws.

Neither Petitioners nor *amici* have identified any other federal courts to address the issue, demonstrating that insufficient time has been spent developing appropriate doctrine and considering the implications of such a major shift in constitutional jurisprudence.

D. There is No Basis for Applying the Heightened Burdens of Implied Rights Of Action or the Standards of 42 U.S.C. §1983 to Claims that This Court Has Always Permitted.

Petitioner suggests preemption claims should only be heard in the federal courts if they meet the standards for a cause of action under an implied private right of action or under 42 U.S.C. § 1983. Pet. 17. This Court has never utilized either standard for a preemption claim, and indeed, petitioner cites no case which has so ruled, and this Court should decline the opportunity to consider such an approach.

Petitioner argues that the "authorization" to seek a remedy "must come from Congress." Pet. 17. While this is clearly the conclusion Petitioners would seek in this case, the petition merely begs the question, since this

Court has previously recognized causes of action that Congress clearly did not even consider. *Ex parte Young*, 209 U.S. 123 (1908) of course, is the best known of such cases, but would not satisfy the standards urged by Petitioners. The Court has likewise recognized implied rights of action arising wholly independently of federal statute. *E.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)(implied right of action arises directly from Fourth Amendment to United States Constitution). While this case would present the question of whether *Ex parte Young* would or should provide a cause of action here, and Respondents do not assert an implied right of action based on the same considerations that drove *Bivens*, the suggestion by Petitioner that all causes of action must arise from Congressional action is simply incorrect.

In this case, a remedy is supplied by the Supremacy Clause; not by an implied private right of action, nor by express declaration of Congress. As this Court has explained, "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000). Thus, the cases cited by petitioner requiring express statements by Congress to create an implied private right of action are simply inapposite to Respondents' preemption claim.

This Court rejected the assertion that a district court could not reach the merits of a preemption claim unless the plaintiff could identify a statutory cause of action in *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002). Indeed, where a case raised what were clearly questions of federal law, this Court ruled that

the federal courts had "authority under 28 US.C. §1331 to review the [State] Commission's order for compliance with federal law." *Id.* Contrary to Petitioners' assertion that the Ninth Circuit has confused this Court's jurisdiction analysis with its right of action analysis, this Court has specified that not only do the district courts have the power to hear such cases, they have "jurisdiction under 28 U.S.C. §1331 to resolve" them. *Id., quoting Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14 (1983)(emphasis added).

The implication of the Petitioners that the district courts have federal question jurisdiction to hear such cases, but lack a Congressionally created cause of action which is required for them to issue a final remedy, is thus directly contrary to both *Shaw* and *Verizon*.

42 U.S.C. §1983 is an express cause of action to enforce statutory and constitutional rights that provides various remedies including both equitable and legal relief. It does not supplant or repeal remedies available under the Constitution and the laws of the United States for equitable relief. Remedies under § 1983 include compensatory and punitive damages against state actors in their individual capacities, compensatory damages against municipalities, and attorneys' fees. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); 42 U.S.C. § 1988.

Preemption claims seek only to enforce the structural relationship between federal and state law established by the Constitution and thus are limited to obtaining prospective equitable relief against state and local officials in their official capacities. The remedies are limited to those "necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). "Preemption concerns the federal structure of the

Nation rather than the securing of rights, privileges, and immunities to individuals." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989). For a non-frivolous preemption claim, "denial of a judicial remedy would undermine federal supremacy and subvert the rule of law by enabling state officers to proceed with enforcement of an invalid state law, to the detriment of private parties." David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 409 (2004).

This Court has emphasized that preemption claims and §1983 serve different purposes and have different requirements. In *Golden State Transit Corp.*, for example, Justice Kennedy explained that though he would have held that the plaintiff could not bring its action under § 1983, nevertheless:

> we would not leave the [plaintiff] without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 *does not provide the exclusive relief* that the federal courts have to offer. * * * [P]laintiffs may vindicate [statutory] preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.). These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.

Id. at 119 (Kennedy, J., dissenting) (some citations omitted, emphasis added).

III. THE PETITION SHOULD BE DENIED AS TO THE SECOND QUESTION BECAUSE THE LAW OF THE NINTH CIRCUIT WITH RESPECT TO SECTION (a)(30)(A) OF THE MEDICAID ACT HAS EVOLVED AND THERE IS NO LONGER ANY SPLIT AMONG THE CIRCUITS.

Petitioners assert that *certiorari* should be granted to decide the question whether Medicaid provider reimbursement rates that bear no relationship to the costs of providing such services, and which are established or maintained purely as budgetary matters violate 42 U.S.C. §1396a(a)(30)(A). Pet. at i. They further assert that the Ninth Circuit's position on this question is somehow "at odds" with that of other circuits. Pet. 25. Because the Ninth Circuit has already changed how it applies the law in response to this Court's opinions in *Douglas*, *certiorari* is simply unnecessary.

In *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the District Court had addressed the issue whether "the State must provide higher payments to hospitals for provision of outpatient services because hospitals incur higher costs than other types of providers." *Id.*, at 1495. The issue arose, in part, because California's Medicaid plan, which had been approved by CMS, "require[d] the Department to develop an evidentiary base or rate study" as part of setting reimbursement rates. *Id.*, at 1494. The requirement for rate studies was thus part of the State Medicaid Plan's method of determining whether the statutory factors of economy, efficiency, access and quality of care had been met. 42 U.S.C. §1396a(a)(30)(A).

In that setting, where the state plan, as approved by CMS, sought to satisfy the statute by requiring the preparation of and reliance on studies of the costs of medical services in setting reimbursement rates, the Ninth Circuit held that:

> The Department cannot know that it is setting rates that are consistent with efficiency, economy, quality of care and access without considering the costs of providing such services. It stands to reason that the *payments* for hospital outpatient services must bear a reasonable relationship to the costs of providing quality care incurred by efficiently and economically operated hospitals.

103 F.3d 1491, 1496.

Orthopaedic Hospital was more widely (though it now appears incorrectly) read as requiring that all Medicaid reimbursement rates bear a reasonable relationship to the costs of providing services. *Orthopaedic Hospital* was read that way to support the various decisions that were consolidated to and remanded in *Douglas*. The District Court in this case understood *Orthopaedic Hospital* in those terms, and, in fact, the instant case was so factually similar to *Orthopaedic Hospital*, that closer analysis was unnecessary and would not have yielded a different outcome. It is the rule of *Orthopaedic Hospital* that Petitioners seek to have this Court review and reverse. Pet. 24.

Both *Orthopaedic Hospital* and the instant case raised the same federal statute. Idaho law, like California law at the time of *Orthopaedic Hospital*, required that reimbursement rates be based on "[t]he actual cost of providing quality services." Idaho Code §56-118. And in

both cases, the state had sought CMS approval for a rate setting methodology that called for conducting and relying on cost studies. It is no surprise that the outcome should be the same in the two cases.

It is now clear, however, that *Orthopaedic Hospital* must be applied much more narrowly than the District Court had thought. That narrow application would not change the outcome of this case, but does bring the Ninth Circuit generally into agreement with the other circuits as to the proper application of Section (a)(30)(A), rendering unnecessary the Petitioner's request for *certiorari* on this issue.

While the panel in this case refused to overrule *Orthopaedic Hospital*, stating that as a three-judge panel it was not free to overrule a prior panel of the Circuit, the panel that decided *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013), faced a different set of facts, and was thus able to clarify and refine *Orthopaedic Hospital* without having to overrule it.

Managed Pharmacy Care was ready for decision only after this Court had spoken in *Douglas*. It also arrived at the Ninth Circuit after CMS had approved a State Plan Amendment ("SPA") which permitted the reimbursement rates in question. In assessing the particular SPA, the Secretary of Health and Human Services, acting through CMS, had approved a rate setting methodology that did not rely on cost studies. Such an approval was entitled to deference, precisely because of the differences in the ways various states structure their Medicaid programs, and because of the deference owed to any administrative agency applying a statute for which it has responsibility:

> The position that costs might or might not be one appropriate measure by which to study beneficiary access, depending on the circumstances of each state's plan, is entirely reasonable. Each state participating in Medicaid has unique, local interests that come to bear. The Secretary must be free to consider, for each State, the most appropriate way for that State to demonstrate compliance with §1396a(a)(30)(A).

Managed Pharmacy Care, 716 F.3d at 1249. Recognizing that *Orthopaedic Hospital* appeared to require a particular methodology for rate setting and thus varied from the approach taken by other states, the Ninth Circuit expressly concluded that with the decision in *Managed Pharmacy Care* to defer to CMS's approval, it would "join" those Circuits. *Id.* at 1249-1250. Thus, as far as that panel was concerned, there was no longer a split among the circuits.

The decision in *Managed pharmacy Care* did not overrule *Orthopaedic Hospital*, instead the panel held that case did not control the outcome because it did not consider the effect of CMS's approval of the State Medicaid Plan. *Id.* at 1245. The only possible way to reconcile the two decisions is to recognize that *Orthopaedic Hospital* was a case addressing a State Medicaid Plan that required cost studies and that, as a result, cost studies were a necessary component of complying with Section (a)(30)(A), while *Managed Pharmacy Care* addressed a State Medicaid Plan that utilized other methods of compliance, which had likewise been approved by CMS. The panel in the instant case, as well as the parties, can be excused for any confusion these cases might have left. Any confusion, however, was irrelevant, since the present case involves a

State Plan (or, in this case a waiver) which requires cost studies, rendering this case more akin to *Orthopaedic Hospital* than to *Managed Pharmacy Care.*[4]

The current state of the law in the Ninth Circuit can now only be understood as requiring cost studies if a State Plan or waiver requires cost studies, but not requiring such studies if CMS has approved a State Plan or waiver that does not require such studies. In short, as in every other Circuit, and as *Douglas* strongly suggests it should be, deference to CMS is the rule in the Ninth Circuit. There is simply no reason to grant *certiorari* to decide whether this case, decided under an older rule that has now been modified and refined to address the very problem Petitioners complain of, should itself be modified or refined.

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4. The Ninth Circuit has further reduced the confusion by issuing *Santa Rosa Mem. Hosp. v. Douglas* 552 Fed.Appx. 637 (9th Cir. 214). In that case the Circuit addressed the remand that was ordered in *Douglas*. Since its prior decision in that case, the Ninth Circuit found, "there have been a number of developments." *Id.* at 638. These developments included the remand order in *Douglas*, repeal of the challenged rate reductions, and the fact that CMS had "approved rate reductions" for the period prior to their repeal. *Id.* In other words, like *Managed Pharmacy Care*, the rate reductions were now part of the CMS-approved state plan. In light of the approval, the Ninth Circuit found that the District Court had abused its discretion in requiring cost studies as a prerequisite to any rate change, and remanded the case to the District Court to consider whether CMS's approval rendered the preliminary injunction inappropriate. *Id.*, at 640.

IV. AS TO THE SECOND QUESTION, THE PETITION SHOULD BE DENIED BECAUSE THE CENTER FOR MEDICARE AND MEDICAID SERVICES IS ON THE VERGE OF PUBLISHING NEW RULES WHICH WOULD CLARIFY THE REQUIREMENTS STATES MUST MEET TO DEMONSTRATE THAT THEIR REIMBURSEMENT RATES ARE CONSISTENT WITH SECTION (a)(30)(A).

In light of growing discord among states, service providers and CMS over the meaning of Section (a)(30)(A)'s provisions on reimbursement rates, CMS has proposed new rules which would clarify those provisions and specify what states must do to ensure that its provisions are met. In May, 2011, CMS published notice of proposed rule making, proposing amendments to require states to actively assess and gather data relating to Medicaid participant access to services, provide for public input from participants and other stakeholders prior to any rate reductions, require an analysis of any proposed rate reduction's affect on access and the state's methods of addressing that impact, and require rate review at least every five years for each service provided. MEDICAID PROGRAM: METHODS FOR ASSURING ACCESS TO COVERED MEDICAID SERVICES, 76 FR 26342 (May 6, 2011)(amending 42 CFR Part 447).

While the final rule has been delayed, CMS has not abandoned the rulemaking, and recently stated that it intends to complete the process and publish a final rule. On May 23, 2014, the federal government website "RegInfo.gov" published its semi-annual "Unified Agenda." The Spring, 2014 Unified Agenda identified the proposed amendments to 42 CFR 447 as ongoing, and stated that

it expected to publish a final rule in November, 2014. UNIFIED AGENDA, Spring 2014, available at http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=0938-AQ54 (last visited August 21, 2014).

On January 16, 2014, CMS published a different final rule which, while not as comprehensive on reimbursement rate and access issues as the rule currently under consideration, did make significant changes to the regulations governing waivers, including clarifying that changes to "methods and standards for setting payment rates" for waiver services, must be preceded by public notice and an opportunity for public input. 42 CFR §441.304(e) and (f).

This litigation, the litigation that resulted in the decision in *Douglas* and a number of other cases, were spawned by the lack of clear guidance as to what states must do to comply with Section (a)(30)(A). The new regulations by CMS, both those already finalized, and those likely to be finalized this year, will provide at least a portion of guidance and should result in states, including Idaho, revising procedures and methods for ensuring compliance with the statute. There is simply no good reason for this Court to address the requirements of Section (a)(30)(A) when the responsible agency is about to do so.

CONCLUSION

For all the reasons set out above, the petition should be denied.

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RECORD AND BRIEFS

No. 14-15

Supreme Court, U.S.
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In The
Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. RESPONDENTS ARE WRONG WHEN THEY CONTEND THAT THE RECORD IS INSUFFICIENT TO PERMIT ADEQUATE REVIEW OF THE QUESTIONS PRESENTED

Respondents say that this case is not an appropriate vehicle to address the questions presented in the petition because the facts are insufficient to permit appropriate review of them. Brief in Opposition 5. The centerpiece of this argument is a waiver amendment application Idaho submitted to the Centers for Medicare and Medicaid Services in 2009 to update the method of setting reimbursement rates to include criteria required by Idaho Code § 56-118. This waiver amendment had nothing to do with the case as pleaded, litigated, or decided in the courts below. It does not bear on the questions whether the Supremacy Clause gives providers a private right of action to enforce § 30(A) or whether reimbursement rates are preempted by § 30(A) if they do not bear some relationship to provider costs and remain in place for budgetary reasons.

Brief elaboration on the facts is in order. The lone reference in the stipulation of facts to the 2009 waiver amendment was that the State "sought CMS approval of an amendment to the DD Waiver to change the method of setting reimbursement rates." Reply App. 7. Appendix I-2.a. of the waiver amendment directs the State to "describe the methods that are employed to establish provider payment rates for waiver services and the entity or entities that are responsible for rate determination." Reply App. 15. The 2009 waiver amendment – which was not even

effective until after Respondents filed suit[1] – describes for CMS the criteria required by Idaho Code § 56-118 to be considered as part of the rate setting process. Reply App. 16-17. And here is where Respondents go wrong: They contend now that the waiver amendment application, CMS's decision on it, and how it was implemented was never discussed by the courts below. The argument goes that this waiver amendment is relevant to both questions presented, but that the record leaves too much unknown to justify this Court's review. Brief in Opposition 7-8. This argument rests on a faulty premise that § 56-118 and the waiver amendment are tied to the rates they challenged.

In short, Respondents' arguments seek to make relevant something that never was in this case. Respondents challenged the State's rates as too low based on new provider cost information derived from studies the State conducted following enactment of § 56-118. Pet. App. 21. Neither § 56-118 nor the 2009 waiver amendment would have necessarily affected rates. Section 56-118 expressly stated that the process that statute mandated did not guarantee any change in rates.[2] Reply App. 13. The waiver amendment giving

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[1] The complaint was filed on December 7, 2009. The waiver amendment they complain about was not even effective until December 16, 2009. Reply App. 15.

[2] Respondents' assertion that Idaho Code § 56-118 required rates to be based on the "actual cost of providing quality services" (Brief in Opposition 20) is therefore belied by the plain language of the statute.

CMS notice of the requirements established by § 56-118 did not specify or necessitate a rate change, either. The waiver amendment did not propose to adopt the 2009 rates. The Department of Health and Welfare conducted the studies, continued to refine the methodology, and reported the results of those studies to the Legislature each year. Any change in rates was left to the Idaho Legislature to decide whether to appropriate funds for any increases. Reply App. 12-13.

In other words, study and consideration of provider costs in the manner prescribed by § 56-118 and identified in the waiver amendment does not mean that rates will automatically be adjusted upward to match those produced by the studies. This is entirely consistent with § 30(A) and the CMS regulations regarding reimbursement. Section 30(A) requires only that state plans, or in this case, waivers, provide "methods and procedures" that are sufficient to ensure efficiency, economy and access to quality care. Nothing in § 30(A) requires granular specificity. Under the general methods and procedures set forth in waiver documents, states retain significant discretion to hone the fine details of rate-setting and to set and adjust rates without the need for CMS approval. *See* 42 C.F.R. § 447.203 (requiring states to document rates and to make them available to CMS on request).[3] Rates are driven by compliance with § 30(A);

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[3] Waiver services are subject to a cost-neutrality requirement, meaning that the average per-capita expenditure for waiver services may not exceed 100 percent of the average per-capita

(Continued on following page)

they are the product of many inputs. Provider cost is one of them. Regardless of the criteria considered, rates may go up or down to ensure compliance with § 30(A).

CMS's decision on the 2009 waiver amendment application therefore does not bear on the questions whether the Supremacy Clause provides a private right of action to enforce § 30(A) or whether the State's rates were preempted by § 30(A) in light of cost information indicating costs had risen. Respondents, however, use the 2009 waiver amendment to consign this case to the same procedural position as *Douglas v. Independent Living Center, Inc.*, 132 S. Ct. 1204 (2012). Brief in Opposition 7-9. There is a key procedural difference between *Independent Living Center* and this case. Following oral argument in *Independent Living Center*, CMS approved California's state plan amendment containing the rate cuts that the plaintiffs challenged. CMS's decision constituted final agency action under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* The Court thus remanded for consideration of whether CMS's decision meant the plaintiffs there had to seek review under the APA against the Secretary of the Department of Health and Human Services rather than against California under the Supremacy Clause. 132 S. Ct. at 1211.

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expenditures that would have been made in hospitals, nursing or other facilities. *See* 42 U.S.C. § 1915(c)(2)(D); 42 C.F.R. 441.302(e).

Here, though, nothing about the 2009 waiver amendment affects either question. As this case was litigated in the courts below and as it comes to this Court, it is a challenge brought under the Supremacy Clause to enforce § 30(A) on the contention that the State's rates are too low because they do not reflect provider costs. This case was not about the 2009 waiver amendment or the State's compliance with it. The complaint makes no mention of the 2009 waiver amendment. The waiver amendment is not in the district court record. Neither the district court nor the court of appeals discussed it. Respondents' contention, therefore, that they sued because the State failed "to actually implement the rate-setting methodology set out in the waiver amendment" (Brief in Opposition 3), is incorrect. Indeed, Respondents agree that CMS's decision on the 2009 waiver amendment was not deemed relevant in the district court. Brief in Opposition 8. They are right about this. This case is and always has been about whether the State's rates violated § 30(A) and whether Respondents had a right of action to bring that challenge. The relevant facts remain as summarized in the petition. The waiver amendment has no relevance now, just as it has not been relevant at any stage in the case.

II. THE QUESTION WHETHER THE SUPREMACY CLAUSE PROVIDES A PRIVATE RIGHT OF ACTION TO ENFORCE § 30(A) IS APPROPRIATE FOR THIS COURT'S REVIEW

Respondents acknowledge there is a split of authority in the circuits on the Supremacy Clause question, but nevertheless urge the Court to deny the petition because according to them, the split is not the sort of split that this Court should resolve. Brief in Opposition 10-15. They argue that the Tenth Circuit's decision in *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814 (10th Cir. 2014), does not constitute a decision worth counting as forming part of a split – it is too new and too narrow; more time is necessary to allow this issue to resolve itself. Brief in Opposition 13-14.

Respondents characterize the holding in *Moser* as "complicated and narrow," applying in only "extremely limited circumstances." Brief in Opposition 13. Their characterization of *Moser* is wrong. The Tenth Circuit's decision in *Moser* stands as a direct and clear and thorough rejection of the approach followed by the Ninth Circuit and the other circuits on that side of the split. *See* 747 F.3d at 836 n.7. And *Moser*'s four-part test that Respondents say makes the holding "complicated and narrow" is neither and in fact plainly would control this case in a post-*Moser* Tenth Circuit: (1) § 30(A) does not specifically authorize injunctive relief; (2) it does not create an individual right; (3) it is a Spending Clause statute; and (4) the State is not conducting or threatening to

conduct criminal or civil enforcement proceedings against the Respondents. *See id.* at 817.

Split or no split, Respondents contend that Petitioners are asking the Court to depart from its cases which they suggest have permitted Supremacy Clause preemption cases like this one without requiring that the standards for establishing a cause of action under 42 U.S.C. § 1983 be met. They claim, too, that under Petitioners' theory, even *Ex parte Young*, 209 U.S. 123 (1908) would not satisfy the standard. Neither of these arguments is correct.

First, the Medicaid Act is Spending Clause legislation – a fact to which Respondents incorrectly assign no significance. This Court has said that Spending Clause legislation "is much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The "typical remedy for state noncompliance with federally imposed conditions is not a private right of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Id.* at 28. So, "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002), *quoting Pennhurst*, 451 U.S. at 17, 28 & n.21. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court explained that if there is to be a cause of action to enforce Spending Clause legislation, § 1983 is "necessarily the exclusive statutory cause of action." 448 U.S. at 6. Where Congress has

not created enforceable rights under the statute in question and § 1983 is therefore unavailable, an implied Supremacy Clause preemption claim to enforce § 30(A) does not square with this Court's cases.

Second, Petitioners are not suggesting *Ex parte Young* and the line of cases following it should be undone or even tampered with. That case involved "the preemptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring). Like *Independent Living Center*, this is not an *Ex parte Young* case. Respondents do not contend that their conduct is subject to any criminal or civil enforcement proceeding. They do not contend that the rates somehow interfere with a federally conferred right. They simply seek to enforce a statute for which Congress did not provide a right of action. *See, e.g., Independent Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("[T]he respondents are not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*. They simply seek a private cause of action Congress chose not to provide.").

* * *

In *Independent Living Center*, the Supremacy Clause question was appropriate for review even before there was an appellate-court split on the question. *See* Brief of Texas, *et al.* as *Amici Curiae* 3. Since *Independent Living Center* the Fifth and Ninth

Circuits have reaffirmed their prior holdings on the question; the Tenth Circuit and the Supreme Judicial Court of Massachusetts have rejected the view of those courts. (Respondents omit any discussion of *Boston Med. Ctr. Corp. v. Sec'y of the Executive Office of Health & Human Servs.*, 974 N.E.2d 1114 (Mass. 2012) (no Supremacy Clause cause of action to enforce § 30(A) in state court).) The Seventh Circuit has called the existence of a right of action under the Supremacy Clause "highly doubtful." *Planned Parenthood of Ind., Inc. v. Indiana State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012). The split is entrenched. It reflects differing views of this Court's cases. Clarity on this question now is critical for states. Nothing is to be gained from delaying review of this issue.

III. QUESTION TWO WARRANTS REVIEW: THERE IS A CIRCUIT SPLIT AND RULEMAKING IS UNLIKELY TO RESOLVE THE ISSUE

Respondents oppose review of the second question for two reasons: (1) There is no longer any split because the Ninth Circuit's view on § 30(A) has "evolved"; and (2) CMS will finalize rulemaking regarding § 30(A) in the near term, resolving all of the issues the question presents.

There is still a split. *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235 (9th Cir. 2013), does not represent the evolution in approach that Respondents claim. In *Managed Pharmacy Care*, plaintiffs sued

both the Secretary of the Department of Health and Human Services in an APA action and California under the Supremacy Clause, challenging CMS's decision to approve California's Medicaid provider reimbursement rate reductions and challenging the state statutes authorizing them. 716 F.3d at 1240. The Ninth Circuit held that where the Secretary approved a state plan amendment that did not require California to conduct the cost studies required by *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the decision was entitled to deference and would stand. *Id.* at 1250. *Orthopaedic Hospital* did not control specifically because in that case the Secretary was not a party and had not set out HHS's position on the requirements of § 30(A). *Id.* at 1245. In *Managed Pharmacy Care*, by contrast, the Secretary was a party and had specifically approved the rate cuts.

The Ninth Circuit recently issued a decision affirming *Orthopaedic Hospital* and limiting *Managed Pharmacy Care*. The result is that *Managed Pharmacy Care* only applies when the challenged state policy was specifically approved by CMS. When a plaintiff challenges a state's policy or decision affecting reimbursement that was not specifically approved by CMS, as here, *Orthopaedic Hospital* still applies, and states must study the effect of its policy changes on efficiency, economy, and access to quality care. In *The Arc of California v. Douglas*, No. 13-16544, 2014 WL 2922662 (9th Cir. Jun. 30, 2014), the court invalidated two California statutes affecting

reimbursement for certain services provided under its Home and Community Based Services waiver. The first, the "uniform holiday schedule" (enacted 2009), precluded compensation for many waiver services rendered on 14 specific dates in the year. *Id.* at *3. The second, the "half-day billing rule" (enacted 2011) required providers to seek reimbursement for only a half day of service, as opposed to a full day, if they provided care for less than 65 percent of a day. Neither rule had been preceded by a study of the impact of those rules on efficiency, economy, and access to quality care. *Id.* at *11. California sought and obtained approval of a waiver renewal application for its waiver covering the period 2011 to 2016. *Id.* The district court applied *Managed Pharmacy Care*, ruling that CMS had approved the waiver application and so the rules were consistent with § 30(A). *Id.* But the Ninth Circuit reversed, noting that the waiver renewal application did not include the uniform holiday schedule or the half-day billing rule. *Id.* Because CMS did not have this information in evaluating the waiver renewal application, it could not have approved it.[4] *Id.* No deference was due, and by not

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[4] The court identified what it called a second reason for declining to defer to HHS's approval of the waiver renewal. It said that the state's failure to include information about the uniform holiday schedule and the half-day billing rule "reflects the scope and purpose of the [Home and Community Based Services] waiver application process." *Id.* at *11. The court explained that in reviewing waiver renewals, the Secretary considers the waiver requirements, not the "separate, more generally applicable state plan requirements," like § 30(A). *Id.*

studying the impact of its policies on § 30(A), California had "total[ly] abdicat[ed]" its obligations under that statute as required by *Orthopaedic Hospital*. *Id.* at *12.

Respondents also argue that CMS has adopted new regulations and that more are "likely to be finalized this year" that will clarify what is required under § 30(A). Brief in Opposition 25. They cite January 2014 amendments to 42 C.F.R. § 441.304(e) and (f), but they do not explain how these have any relevance to the question whether rates must bear some relationship to provider costs and whether they must be raised to reflect those costs. These subsections address notice and public participation to be provided when substantive changes are made to an HCBS waiver. They say nothing about compliance with § 30(A) and have no relevance to this case.

Finally, the status of the May 2011 rulemaking that would address compliance with § 30(A) is no more clear than it has been in the three-plus years since it was proposed. The website Respondents cite lists November 2014 as the date for final action on the rule, but provides no other information. Typically, when CMS is proposing a rule, it will communicate with states and states will be aware that a rule is likely to be finalized. Idaho has no information suggesting the rulemaking will be finalized by November 2014. Regardless of the status of the rule, however, Petitioners are not asking this Court to interfere with whatever CMS might adopt. Petitioners ask the Court to grant the petition as to this question to

decide the extent to which federal courts may impose on states requirements that do not appear in the Medicaid Act.

* * *

The petition should be granted.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

INCLUSION, INC., EXCEPTIONAL CHILD CENTER, INC., LIVING INDEPENDENTLY FOR EVERYONE, INC. TOMORROW'S HOPE SATELLITE SERVICES, INC., WDB, INC.,	Case No. 09-CV-00634-BLW
Plaintiffs,	STIPULATION OF FACTS
v.	
RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities,	
Defendants.	

COME NOW Defendants Armstrong and Clement, by and through their attorneys of record, and the above-named Plaintiffs, by and through their attorney of record, and hereby stipulate and agree to the following facts:

I. The Parties

1. Plaintiffs are five Idaho corporations providing services to Medicaid eligible individuals in the state of Idaho.

2. Defendant Richard Armstrong is the Director of Idaho's Department of Health and Welfare (IDHW). Defendant Leslie Clement is an IDHW Deputy Director and former IDHW Division of Medicaid Administrator with responsibility for administering and operating Idaho's Medicaid Plan at all times relevant to this litigation.

II. Services Provided by Plaintiffs That are the Subject of this Lawsuit

1. Medicaid is a cooperative federal-state program that directs federal funding to participating states to "enable[e] [sic] each state, as far as practicable to furnish medical assistance on behalf of families with dependent children and of aged, blind and disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396-1. Should a state choose to participate in the Medicaid program, it must comply

with the requirements of the Medicaid Act. The State of Idaho has chosen to participate in the Medicaid program.

2. Idaho's Medicaid-covered services are set out in the Medicaid state plan. The State of Idaho also covers certain Medicaid benefits pursuant to waivers approved by the Federal Center for Medicaid and Medicare Services ("CMS"). One such waiver is known as the Developmentally Disabled Home and Community Based Services Waiver ("DD Waiver").

3. Pursuant to the DD Waiver, individuals who qualify to receive medical assistance and rehabilitation services under the Idaho Medicaid state plan and who also meet institutional level of care requirements to receive care in an Intermediate Care Facility for People with Intellectual Disabilities ("ICF/ID") may choose to reside in either their own home and receive Supported Living services or in a Certified Family Home ("CFH"). *See* IDAPA 16.03.10.702.03.

4. Plaintiffs in this case are Residential Habilitation Agencies (RHA) providing Residential Habilitation in Supported Living settings.

5. Residential Habilitation consists of an integrated array of individually-tailored services and supports which are designed to assist eligible participants to reside successfully in the community. These services and supports are set forth in IDAPA 16.03.10.703 and include skills training and/or direct assistance in areas such as decision making, money management, daily living skills, socialization,

mobility and behavior shaping or management. Residential Habilitiation [sic] also includes personal assistance services to the participant in daily living activities, household tasks, and routine activities which the individual is unable to accomplish on his or her own, including grooming, bathing, eating, administering medications that are normally self-administered, communication, cleaning, laundry, meal preparation, shopping and the like. Residential Habilitation may also include skills training for participants, their family members and other caregivers.

III. Reimbursement Rates for Residential Habilitation Services/Supported Living

1. Each RHA wishing to offer services reimbursed by Medicaid must execute a Medicaid Provider Agreement. One of the terms of the Medicaid Provider Agreement is that the provider must accept Medicaid reimbursement as the total payment for covered services. Each of the Plaintiffs has executed one or more provider agreements.

2. From March 2001 through November 2002, supported living services provided under the DD Waiver were reimbursed at an hourly rate with an effective cap of $202.60 per day.

3. Effective September 1, 2003, at the request of RHAs providing supported living service and developmental disability agency services, such as developmental therapy, IDHW instituted a "wrap around" service and reimbursement rate. Under the wrap

around service, providers could be reimbursed a daily rate of $242.14 per day for all residential habilitation and supervisory services provided to residents in supported living.

4. Effective October 1, 2004, following onsite observation of participants and survey of RHAs, IDHW initiated acuity based levels of care, and changed reimbursement for wrap around services to $221.12 per day for residents requiring a "High Support" level, and $263.36 per day for residents requiring "Intense Support."

5. Effective July 1, 2006, the IDHW modified the wrap around service rates, changing "High Support" rate to $225.32 per day, and the "Intense Support" rate to $268.36. At the same time, rates for supported living services that were billed on an hourly basis were increased to $12.96 per hour for individual services, and $7.64 per hour for group services. These rates are still effective today.

IV. The IDHW's Studies of Costs for Supported Living Services

1. In 2005 the Idaho Legislature adopted Idaho Code Section 56-118 requiring the IDHW to implement reimbursement rate setting methodologies for various Medicaid services including residential habilitation agency services. As part of its efforts to comply with I.C. §56-118 the IDHW contracted with Johnson, Villegas-Grubb and Associates ("JVGA") to assist in establishing a methodology for reviewing

and determining Medicaid reimbursement rates to private businesses providing community-based services.

2. The first report from JVGA was submitted to the Idaho Legislature on November 30, 2006. JVGA's first report was the result of a survey of Medicaid providers to determine their costs of providing service. Utilizing what JVGA called the "Arizona Model," a proposed reimbursement rate for each service was calculated utilizing a direct service wage component, with additions calculated as a percentage of direct service wages for Employment Related Expenditures, Program Related Expenditures, and General and Administrative Expenses. The JVGA report recommended the following changes in reimbursement rates for residential habilitation services in a supported living environment:

Description	2006 Rate	JVGA Proposed Rate	% Change
Daily Rate – High Support	$225.32	$228.48	1.4%
Daily Rate – Intense Support	$268.36	$342.72	27.7%
Hourly Rate – Individual	$12.96	$18.72	44.3%
Hourly Rate – Group	$7.64	$7.48	-2.1%

3. The IDHW did not modify residential habilitiation [sic] reimbursement rates as proposed by JVGA, but continued to conduct cost and time studies. The results of the IDHW's studies were reported to the Legislature each year.

4. In 2009, the IDHW compiled the results of its cost studies over the preceding years, made modifications to the "Arizona Model" as proposed by JVGA, and sought CMS approval of an amendment to the DD Waiver to change the method of setting reimbursement rates. The IDHW created a "Summary of Service Codes" based on the available studies which calculated proposed reimbursement rates for certain services based on wage rates, employment related expenditures, program support expenses, paid leave time and general and administrative expenses. The IDHW's 2009 calculation was part of its report to the legislature under I.C. §56-118. The following is a comparison of the 2006 Rates, the JVGA Proposed Rates and the IDHW's 2009 calculations:

Description	2006 Rate	JVGA Proposed Rate	IDHW's Proposed 2009 Rate
Daily Rate – High Support	$225.32	$228.48	$248.40
Daily Rate – Intense Support	$268.36	$342.72	$496.56
Hourly Rate – Individual	$12.96	$18.72	$20.68
Hourly Rate – Group	$7.64	$7.48	$8.28

5. The IDHW has not implemented the rates set out in the 2009 calculation for the services at issue in this case.

6. Sheila Pugatch is the Principal Financial Specialist at IDHW. She manages the Office of Reimbursement Policy, which has primary responsibility for setting Medicaid reimbursement rates.

7. Ms. Pugatch directed the IDHW's efforts to conduct cost studies and to calculate proposed reimbursement rates, including the IDHW's 2009 rate proposals. In addition, Ms. Pugatch oversaw the efforts of JVGA to collect and analyze cost data. The result of the JVGA proposal on rates would have been a $4 million increase in state Medicaid expenditures, If the Legislature had appropriated additional funds, the IDHW intended to implement the JVGA proposed rates. The Legislature did not, however, appropriate funds for those increases.

8. The present rate, implemented in 2006, is not based on the cost studies performed between 2006 and 2009. The IDHW would implement the rates set out in the 2009 legislative report if the Idaho Legislature would appropriate the funds to pay them. In the absence of an appropriation, the IDHW has not implemented those rates.

V. Access to Supported Living Services

1. Services covered by the DD Waiver are readily available to eligible participants. There are

no waiting lists for any Medicaid services in Idaho. If a DD Waiver participant chooses to live in their own home and receive supported living services, the participant's service coordinator and care manager assist with providing the participant RHAs in the geographic area to choose from.

2. Currently there are 61 RHAs certified to provide supported living services in Idaho. The following table shows the number of RNAs providing supported living services in each of IDHW's seven regions throughout the state:

Region 1 = 5
Region 2 = 7
Region 3 = 9
Region 4 = 14
Region 5 = 7
Region 6 = 9
Region 7 = 10

3. There are 6,202 participants receiving supported living services. As of the end of calendar year 2010 Plaintiffs submitted claims for supported living services for the following number of participants:

Provider	# of Participants	% of Total
Inclusions Inc.	138	2.2%
Excepitonal [sic] Child Center, Inc.	10	.16%
Living Independently For Everyone, Inc.	36	.6%
WDB, Inc.	38	.61%
Total Plaintiffs	222	3.5%

4. The IDHW Critical Incident and Complaint Data Base, used to track all Medicaid benefits and services complaints, including complaints related to access to services, shows no unresolved complaints for supported living services.

5. Jim Whitaker, Operations Director for Plaintiff Inclusions, Inc., testified that Inclusions, Inc. had not ever turned away a prospective client because it could not afford to provide supported living services.

6. James Hutchings, Administrator and owner of Exceptional Child Center, Inc. testified that his agency could take on at least two more supported living clients. To his knowledge his agency had not ever turned away a supported living client.

DATED this 25th day of July, 2011,

HERZFELD & PIOTROWSKI

/s/
JAMES M. PIOTROWSKI
Attorney for Plaintiffs

DATED this 25th day of July, 2011.

OFFICE OF THE
ATTORNEY GENERAL

/s/ Peg M. Dougherty
PEG M. DOUGHERTY
Attorney for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and serviced a copy of said document upon all parties by the method listed below:

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IDAHO CODE 56-118. REIMBURSEMENT RATES. (1) The department shall implement a methodology for reviewing and determining reimbursement rates to private businesses providing developmental disability agency services, mental health services, service coordination and case management services, residential habilitation agency services and affiliated residential habilitation specialized family home services annually.

(2) In addition to any policy or federal statutory requirements, such methodology shall incorporate, at a minimum, the following:

(a) The actual cost of providing quality services, including personnel and total operating expenses, directly related to providing such services which shall be provided by the private business entities;

(b) Changes in the expectations placed on private business providers in delivering services;

(c) Inflationary effects on the private business providers' ability to deliver the service since the last adjustment to the rate;

(d) Comparison of rates paid in neighboring states for comparable services;

(e) Comparison of any rates paid for comparable services in other public or private capacities.

(3) A report of the results of this analysis and review shall be sent to the director, to the joint finance-appropriations committee and the health and welfare

committees of the senate and the house of representatives by November 30 of each year. The department shall include in the report cost saving suggestions that private businesses shall provide. Any changes in reimbursement rates shall include estimated costs of implementation based on the current caseload forecasts and shall be submitted as part of the departments budget request required in section 67-3502, Idaho Code. Reimbursement rates included in appropriation bills enacted by the legislature shall become effective not later than July 1 of each year.

(4) The results of this annual review and analysis and subsequent rules do not guarantee a change in reimbursement rates, but shall be a fair and equitable process for establishing and reviewing such rates.

Approved on the 21st day of March, 2005.

Effective: July 1, 2005.

Application for a §1915(c) Home and Community-Based Services Waiver

PURPOSE OF THE HCBS WAIVER PROGRAM

The Medicaid Home and Community-Based Services (HCBS) waiver program is authorized in §1915(c) of the Social Security Act. The program permits a State to furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization. The State has broad discretion to design its waiver program to address the needs of the waiver's target population. Waiver services complement and/or supplement the services that are available to participants through the Medicaid State plan and other federal, state and local public programs as well as the supports that families and communities provide.

The Centers for Medicare & Medicaid Services (CMS) recognizes that the design and operational features of a waiver program will vary depending on the specific needs of the target population, the resources available to the State, service delivery system structure, State goals and objectives, and other factors. A State has the latitude to design a waiver program that is cost-effective and employs a variety of service delivery approaches, including participant direction of services.

Request for an Amendment to a §1915(c) Home and Community-Based Services Waiver

1. Request Information

A. The **State** of **Idaho** requests approval for an amendment to the following Medicaid home and community-based services waiver approved under authority of §1915(c) of the Social Security Act.

B. **Program Title:**
Idaho Developmental Disabilities Waiver (renewal)

C. **Waiver Number:ID.0076**
Original Base Waiver Number: ID.0076.90.R3B

D. **Amendment Number:ID.0076.R04.03**

E. **Proposed Effective Date**: *(mm/dd/yy)*

12/16/09

Approved Effective Date: 12/16/09
Approved Effective Date of Waiver being Amended: 10/01/07

Appendix I: Financial Accountability

I-2: Rates, Billing and Claims (1 of 3)

a. **Rate Determination Methods.** In two pages or less, describe the methods that are employed to establish provider payment rates for waiver services and the entity or entities that are responsible for rate determination. Indicate any opportunity for public comment in the process. If different methods are employed for various types of services, the description may group services for

which the same method is employed. State laws, regulations, and policies referenced in the description are available upon request to CMS through the Medicaid agency or the operating agency (if applicable).

The Department, implements procedures to comply with Idaho Code §56-118. This statute requires that the Department implement methodology for annual review and determination of reimbursement rates to private businesses providing developmental disability agency services, mental health services, service coordination and case management services, residential habilitation agency services and affiliated residential habilitation specialized family services. A report of the results of this annual analysis is submitted annually, by November 30, to the Joint Finance-Appropriations Committee and the Health and Welfare Committee of the Senate and House of Representatives.

The annual analysis of reimbursement rates that is required by Idaho Code §56-118 includes solicitation and survey of service providers for information and comment in order to establish rate determination methods and develop fair and equitable rates.

Pursuant to 42 CFR § 447.205, the Idaho Department of Health and Welfare gives notice of its proposed reimbursement changes by publishing legal notices throughout the State to inform providers about any change. Additionally, payment rates are published on our website at www.healthandwelfare.idaho.gov for participants

to access either themselves or through their guardian.

Waiver service providers will be paid on a fee for service basis as established by the Department depending on the type of service provided. The Bureau of Financial Operations is responsible for rate determinations. The Department holds hearings when we promulgate rules to describe the reimbursement methodology. As described below, most waiver service reimbursement rates were developed based on Personal Care Service rates and then increased or decreased based on the qualifications, supervision, and agency costs required to deliver the waiver service. This is in the methodology currently in effect.

Please see below for services and Reimbursement Methodology information:

Residential Habilitation

The initial rate was set based on Personal Care Service rates and then increased or decreased based on the qualifications to provide the waiver service, what sort of supervision was required, and agency costs associated with delivering the services.

RECORD AND BRIEFS

No. 14-15

Supreme Court, U.S.
FILED
AUG - 6 2014
OFFICE OF THE CLERK

In the Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the Supremacy Clause give Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a State where Congress chose not to create enforceable rights under that statute?

2. If Medicaid providers have a private right of action, are a State's Medicaid provider reimbursement rates preempted by § 1396a(a)(30)(A) where they do not bear a reasonable relationship to provider costs and remain in place for budgetary reasons?

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In the Supreme Court of the United States

No. 14-15

RICHARD ARMSTRONG AND LISA HETTINGER,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTEREST OF AMICI

The Ninth Circuit and many other courts of appeals have held that the Supremacy Clause authorizes private lawsuits to enforce *every* federal statute against state officials—even when Congress has refused to provide a private right of action to enforce that federal statute, and

even when the statute does not create federal "rights" enforceable under 42 U.S.C. § 1983. *See, e.g., Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1058 (9th Cir. 2008); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). The Tenth Circuit recently rejected this view, establishing a circuit split. *See Planned Parenthood of Kan. and Mid-Missouri v. Moser*, 747 F.3d 814, 822–36 (10th Cir. 2014). The amici curiae States have an interest in having this circuit split resolved, as the States have been subjected to many unwarranted lawsuits on account of the Ninth Circuit's misguided interpretation of the Supremacy Clause.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEP SPLIT AMONG APPELLATE COURTS OVER WHETHER THE SUPREMACY CLAUSE CREATES AN IMPLIED RIGHT OF ACTION TO SUE STATE OFFICIALS

In *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012), this Court granted certiorari to decide whether the Supremacy Clause authorizes private lawsuits against state officials who violate a federal statute—even when Congress has refused to provide a private right of action to enforce that statute. *See Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, 131 S. Ct. 992 (2011). But the Court did not resolve this question in *Douglas*; it disposed of the case on other grounds.

Since the Court's ruling in *Douglas*, a circuit split has developed on this issue. The Tenth Circuit expressly re-

jected the Ninth Circuit's holding that the Supremacy Clause confers a private right of action whenever a state official is accused of violating a federal statute. *See Moser*, 747 F.3d at 822–36. The Seventh Circuit declared that the Ninth Circuit's interpretation of the Supremacy Clause is "highly doubtful." *Planned Parenthood of Ind., Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012). And the Supreme Judicial Court of Massachusetts specifically held that the Supremacy Clause may not be used to enforce 42 U.S.C. § 1396a(a)(30)(A) against state officials. *See Boston Med. Ctr. Corp. v. Sec'y of the Exec. Office of Health & Human Servs.*, 974 N.E.2d 1114, 1128 (Mass. 2012) ("The plaintiffs … attempt to make the supremacy clause a source of Federal rights by claiming that it provides a private right of action that is not available under § 1396a(a)(30)(A). We agree with Chief Justice Roberts's view on the matter, as expressed in *Douglas*.").

When this Court granted certiorari in *Douglas*, there was no appellate-court split on whether the Supremacy Clause establishes an implied right of action to bring "preemption" claims against state officials. Now there are two appellate courts that have explicitly rejected that view—and another that has called it into doubt. The need for this Court's resolution is even more urgent than it was in *Douglas*. And the Court now has the benefit of a thoughtful and scholarly opinion from the Tenth Circuit that rejects the approach of the Ninth Circuit and the other courts of appeals. *See Moser*, 747 F.3d at 822–36; *see also The Wilderness Society v. Kane County*, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting). There is little if anything to be gained from fur-

ther percolation, as almost every court of appeals has weighed in on this question.

By our count, the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have unambiguously established that private litigants may sue state officials directly under the Supremacy Clause even absent a statutory cause of action. *See P.R. Tel. Co., Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006) ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action.") (citation and internal quotation marks omitted); *Burgio & Campofelice v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) ("[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate [federal law]."); *Lewis v. Alexander*, 685 F.3d 325, 345–46 (3d Cir. 2012) ("[T]he Supremacy Clause creates an independent right of action where a party alleges preemption of state law by federal law.") (citation omitted); *United States v. South Carolina*, 720 F.3d 518, 526 (4th Cir. 2013) ("We hold that under the Supremacy Clause [the] Plaintiffs have an implied right of action to seek injunctive relief from South Carolina's Act 69 on federal preemption grounds."); *Sanchez*, 403 F.3d at 333 (holding that the Supremacy Clause establishes an implied cause of action to enforce preemptive federal legislation against state officials); *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012) ("The federal law with purported preemptive effect need not expressly provide a cause of action against preempted state law; the cause of action is implied under the Supremacy Clause ..."");

Shewry, 543 F.3d at 1065 ("[A] private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The Eleventh Circuit has cases that look both ways on this question. *Compare Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1261 (11th Cir. 2012) ("The propriety of bringing a challenge for injunctive and declaratory relief on the grounds that a state law is preempted by virtue of the Supremacy Clause has gone largely unquestioned.") *with Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 640, 643 (11th Cir. 1990) (rejecting the proposition that a "constitutional cause of action should be implied directly from the Supremacy Clause").

Against these courts stand the Tenth Circuit and Supreme Judicial Court of Massachusetts, each of which has rejected the notion that the Supremacy Clause allows private litigants to sue state officials whenever they violate a federal statute—and the Seventh Circuit, which has declared this interpretation of the Supremacy Clause "highly doubtful." *See Moser*, 747 F.3d at 822–36; *Boston Med. Ctr. Corp.*, 974 N.E.2d at 1128; *Planned Parenthood of Ind.*, 699 F.3d at 983. There are also federal district-court opinions that reject or express doubts on this view of the Supremacy Clause. *See, e.g.*, *Mashpee Tribe v. Watt*, 542 F. Supp. 797, 806 (D. Mass. 1982) ("The Supremacy Clause does not support direct causes of action. . . . It only gives priority to federal rights created by a federal statute when they conflict with state law."), *aff'd*, 707 F.2d 23 (1st Cir. 1983); *Dartmouth-Hitchcock Clinic v. Toumpas*, 856 F. Supp. 2d 315, 321–22 (D.N.H. 2012) ("*Douglas* raises more questions than it

answers, and adds a measure of uncertainty to the law applicable in resolving plaintiffs' substantive claims in this case. . . . So, a critical legal question, potentially dispositive of plaintiffs' Supremacy Clause claim, remains unanswered.").

This split in authority is deep, well-developed, and features reasoned opinions on both sides of the issue. The issue could not possibly become more ripe for this Court's resolution.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE SUPREMACY CLAUSE IS UNTENABLE AND HAS SUBJECTED STATE OFFICIALS TO MANY IMPROPER LAWSUITS

The Court should grant certiorari not only to resolve this split in authority but also to relieve the States of the numerous private lawsuits to which they have been improperly subjected. The Ninth Circuit's view of the Supremacy Clause is not only irreconcilable with the Tenth Circuit's opinion in *Moser*, it is (more importantly) irreconcilable with the Constitution and the jurisprudence of this Court. All the more reason for this Court to grant certiorari to resolve whether the Supremacy Clause creates a private of action to sue state officials.

The Ninth Circuit's understanding of the Supremacy Clause is untenable for many reasons—not least of which is that it renders 42 U.S.C. § 1983 superfluous and allows private litigants to make an end-run around the decisions from this Court that purport to limit state-official liability. *See Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("[T]o say that there is a federal statutory right

enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. §1983 jurisprudence."). This Court has long held that state officials may be sued under section 1983 only when they violate federally protected *rights*—not whenever they violate some provision of federal *law*. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."); *see also Gonzaga Univ. v. Doe*, 536 U. S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action."). Yet the Ninth Circuit (and other courts of appeals) have declared that state officials can be sued under the Supremacy Clause whenever they violate *any* provision of federal law—so long as a litigant can establish Article III standing. This means that Congress's decision to enact section 1983 was a meaningless gesture, and that Congress's decision to limit state-official liability to violations of federally protected "rights" has no legal effect.

All of this is well explained in Chief Justice Roberts's dissenting opinion in *Douglas*—and not a single member of this Court attempted to defend the Ninth Circuit's view of the Supremacy Clause in light of Chief Justice Roberts's objections. Yet there are even more reasons why the Ninth Circuit's interpretation of the Supremacy Clause should be repudiated.

A. Nothing In The Language Of The Supremacy Clause Purports To Authorize Private Litigants To Sue State Officials For Violating Federal Law

Before a court concludes that the Supremacy Clause establishes a private right of action by which citizens may sue a State's officials, it should consider and analyze the text of that constitutional provision. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

This language merely provides a choice-of-law rule directed to the "Judges in every State." Those judges must regard the Constitution, federal statutes, and treaties as "supreme," while subordinating all other forms of law (such as state law, international law, and judicial precedents) to the supreme law of the land. Nothing in the text of the Supremacy Clause purports to establish subject-matter jurisdiction for federal courts to adjudicate alleged conflicts between "supreme" and "non-

supreme" laws,[1] and it assuredly does not provide a cause of action authorizing private litigants to sue state officers (or anyone else) who violate a provision of supreme federal law. The power of federal courts to adjudicate these disputes, and the right of private litigants to bring these claims, must come from some other source of law.

The Supremacy Clause says nothing about the crucial issues that define this cause of action that the Ninth Circuit claims to have found in the Constitution. Who can be sued under this cause of action? Anyone who violates a federal law or treaty? Only state officials? The State itself? And what relief may be obtained from these alleged federal lawbreakers? Money damages or only injunctive relief? Would there be a right to jury trial?[2] If the Supremacy Clause had been understood to authorize private lawsuits by persons seeking to vindicate federal law, one would expect the Supremacy Clause to say something about these questions. Its silence on these matters indicates that it does not authorize lawsuits by private citizens against state officials.

---

[1] For nearly 100 years, there was no general federal-question jurisdiction in the federal courts, and this Court has never held that the Supremacy Clause could create subject-matter jurisdiction that Congress has not conferred by statute.

[2] The Seventh Amendment secured the jury right only in cases at common law; most cases alleging a violation of a federal statute by state officials would fall outside the scope of the Amendment.

B. The Ninth Circuit's Interpretation Of The Supremacy Clause Is Irreconcilable With This Court's Rulings In *Alexander v. Sandoval*, *Horne v. Flores*, And *Maine v. Thibotout*

The Ninth Circuit's interpretation of the Supremacy Clause contradicts no fewer than three decisions of this Court.

The first is *Alexander v. Sandoval*, 532 U.S. 275 (2001), which explicitly and emphatically holds that private rights of action to enforce federal statutes must be created by Congress:

> Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. *Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Id. at 286–87 (emphases added) (citations and internal quotation marks omitted). The Ninth Circuit's decision defies *Alexander* by recognizing a private right of action to enforce a federal statute that was *not* "created by

Congress." Worse, the Ninth Circuit turns *Alexander* on its head by authorizing private litigants to sue directly under the Supremacy Clause whenever Congress declines to create a cause of action to enforce a federal statute—a regime diametrically opposed to the holding of *Alexander*.

The second is *Horne v. Flores*, 557 U.S. 433 (2009). *Horne* holds that there is no private cause of action to advance a preemption claim under the No Child Left Behind Act (NCLB), because Congress did not provide for a cause of action to enforce that federal statute:

> *Whether or not HB 2064 violates § 7902*, see Brief for United States as Amicus Curiae 31–32, and n. 8 (suggesting it does), *neither court below was empowered to decide the issue.* As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F.3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Horne, 557 U.S. at 456 n.6 (emphasis added).

The Ninth Circuit's interpretation of the Supremacy Clause is incompatible with this discussion in *Horne*. In the Ninth Circuit, any litigant may bring an NCLB "preemption" claim directly under the Constitution—regardless of whether the NCLB establishes a cause of action—even though *Horne* holds that federal courts are not "empowered to decide" these preemption claims. *See*

id. And there is no possible basis on which a court can distinguish "preemption" claims brought under the NCLB from "preemption" claims brought under the Medicaid Act; both statutes were enacted as spending legislation.

The third is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that litigants may use 42 U.S.C. § 1983 to enforce federal statutes (and not merely constitutional provisions) that create individual "rights," and defended this conclusion by noting that previous cases had allowed litigants to sue to enforce statutory provisions in the Social Security Act (SSA). Writing for the Court, Justice Brennan insisted that these earlier cases *necessarily relied on section 1983* because that was the *only possible source* for a cause of action to enforce the SSA:

> [O]ur analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. In each of the following cases *§ 1983 was necessarily the exclusive statutory cause of action* because, as the Court held in *Edelman v. Jordan*, 415 U.S. [651], at 673–674 [(1974)], *id.*, at 690 (Marshall, J., dissenting), the SSA affords no private right of action against a State.

Thiboutot, 448 U.S. at 5–6 (emphasis added). This passage makes clear that when the Social Security Act (or any other federal statute) fails to authorize private lawsuits against state officials, the *only* basis on which a private litigant may sue to enforce that statute is section 1983.

If the Ninth Circuit is correct, then *Thiboutot* is wrong. The Ninth Circuit held that section 1983 is *not* the exclusive cause of action for enforcing the SSA (even though *Thibotout* says that it *is*) because on the Ninth Circuit's view private litigants may sue directly under the Supremacy Clause regardless of whether section 1983 could authorize the suit. That means that *Thiboutot* was wrong to state that previous lawsuits brought against state officials for allegedly violating the SSA necessarily relied on section 1983. Under the Ninth Circuit's reasoning, those pre-*Thibotout* cases could have relied on the Supremacy Clause to supply a cause of action, which means they do not have any implications for whether section 1983 is available to enforce statutory (as opposed to constitutional) rights.

C. The Ninth Circuit's Interpretation Of The Supremacy Clause Disables Congress From Precluding The Private Enforcement Of Federal Statutes And Treaties Against State Officials

The notion that the Supremacy Clause empowers private litigants to bring "preemption" claims against state officials who violate "supreme" federal law has radical and far-reaching implications. The Supremacy Clause gives treaties the same "supreme" status as federal statutes. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ..."). So under the Ninth Circuit's reasoning, every treaty obliga-

tion that conflicts with state law should be enforceable through private lawsuits brought directly under the Supremacy Clause. Even when a treaty is non-self-executing or fails to provide a private right of action, a litigant could rely on the Supremacy Clause to supply the cause of action—just as the plaintiffs were permitted to do here. That would require this Court to repudiate its observation in *Medellin v. Texas*, 552 U.S. 491 (2008), that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment *a*, p. 395 (1986)).

The Ninth Circuit's holding also means that Congress is powerless to preclude private lawsuits to enforce federal law, because the Supremacy Clause is part of the Constitution and cannot be altered through ordinary legislation. Even a statute explicitly prohibiting private rights of action to enforce the Medicaid Act would be unable to prevent the "preemption" lawsuit brought by the plaintiffs in this case, because their purported cause of action is derived directly from the Constitution and is therefore immune from congressional revision. If the plaintiffs wish to concede that Congress may alter or abolish the cause of action on which they rely, then they must explain how Congress can change the meaning of the Supremacy Clause through ordinary legislation.

III. THIS CASE IS AN IDEAL VEHICLE FOR CONSIDERING THE IMPLIED-RIGHT-OF-ACTION ISSUE

This case presents an especially good vehicle for considering the implied-right-of-action issue.

First, the plaintiffs are not only seeking to enforce a federal statute that fails to provide a statutory cause of action, they are seeking to enforce *spending clause* legislation without a statute that authorizes private lawsuits. If this Court is unable to agree on the broader questions surrounding the meaning of the Supremacy Clause, this petition offers the possibility of a more narrow holding limited to federal spending legislation. The Court could, for example, hold that the Supremacy Clause cannot supply a cause of action to enforce *spending* legislation against state officials, and that any private right of action to enforce such legislation must be spelled out in clear and unambiguous statutory language. *See generally Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). As Justice Kennedy has explained:

> When the statute at issue is a Spending Clause statute, this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. . Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting fed-

> eral funds, had clear notice of the terms and conditions of its monetary liability."

Davis v. Monroe Cnty. Bd. of Ed., 526 U.S. 629, 656–57 (1999) (Kennedy, J., dissenting). Although the amici States would prefer a holding that precludes all implied rights of action under the Supremacy Clause, this case allows for a more narrow holding if the Court is unwilling to go that far. For this reason, the amici States respectfully submit that the Court's failure to reach agreement on the implied-right-of-action question in *Douglas* should not deter the Court from granting certiorari here.

Second, this case is distinguishable from *Ex parte Young*, 209 U.S. 123 (1908), and neither the petitioners' arguments nor the amici States' arguments would undermine the implied right of action in that case. *Ex parte Young* allows litigants to bring preemptive lawsuits to enjoin state enforcement proceedings against them. This cause of action does not rest on the Supremacy Clause but on principles of equity that allow potential defendants at law to assert their defenses preemptively by seeking the equitable remedy of an anti-suit injunction. *See* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008). Five members of the Court have endorsed this understanding of *Ex parte Young*. *See Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) ("[*Ex parte Young*'s] negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *Douglas*, 132 S. Ct. at 1213 (Rob-

erts, C. J., dissenting) (endorsing Justice Kennedy's explanation of *Ex parte Young*).[3] This view of *Ex parte Young* is far more sound than Professors Wright and Miller's claim that *Ex parte Young* authorizes private lawsuits whenever a state official is accused of violating any provision of federal law. *See* 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure*: § 3566, at 102 (1984) ("The best explanation of *Ex Parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws."). This too allows the Court to issue a narrow holding—a holding that preserves the implied right of action recognized in *Ex parte Young*, while rejecting the far-reaching Supremacy–Clause right of action established by the Ninth Circuit.

* * *

The deep circuit split that exists on this issue is alone sufficient to justify a grant of certiorari. That the States continue to be subjected to improper lawsuits on account of the Ninth Circuit's untenable interpretation of the Supremacy Clause only strengthens the case for certiorari. The amici curiae States respectfully ask this Court to grant the petition and hold that the Supremacy Clause

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[3] The Seventh and Tenth Circuits have also endorsed Justice Kennedy's explanation of *Ex parte Young*. *See Planned Parenthood of Indiana, Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012); *Planned Parenthood of Kansas and Mid-Missouri v. Moser*, 747 F.3d 814, 829–30 (10th Cir. 2014).

does not provide a basis for private lawsuits that have not been authorized by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 2014

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RECORD AND BRIEFS

No. 14-15

FILED
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In The
Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 2, 2014
Certiorari Granted October 2, 2014

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

District Court Memorandum Decision and Order dated December 12, 2011 ..... App. 15

District Court Memorandum Decision and Order dated April 12, 2012 ..... App. 7

District Court Judgment dated April 12, 2012 .... App. 5

Ninth Circuit Court of Appeals Memorandum filed April 4, 2014 ..... App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

INCLUSION, INC., EXCEPTIONAL CHILD CENTER, INC., LIVING INDEPENDENTLY FOR EVERYONE, INC., TOMORROW'S HOPE SATELLITE SERVICES, INC., WDB, INC.,	)	Case No. 09-CV-00634-BLW
Plaintiffs,	)	Relevant Docket Entries
v.	)	
RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities,	)	
Defendants.	)	

Date Filed	No.	Docket Text
12/07/2009	1	COMPLAINT against Richard Armstrong, Leslie Clement (Filing fee $ 350 receipt number 0976-546767.), filed by Tomorrow's Hope Satellite Services, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Exceptional Child Center, Inc., WDB, Inc.. (Attachments: # 1 Summons Leslie Clement, # 2 Summons Richard Armstrong) (Piotrowski, James) (Main Document 1 replaced on 12/8/2009) (dks).
12/07/2009	2	Civil Cover Sheet re 1 Complaint, filed by Inclusion, Inc., Exceptional Child Center, Inc., WDB, Inc., Living

Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc.. (Piotrowski, James) (Main Document 2 replaced on 12/8/2009) (dks).

12/08/2009 3 Summons Issued as to Richard Armstrong, Leslie Clement. (Print attached Summons for service.) (Attachments: # 1 Summons issued) (dks)

01/11/2010 4 NOTICE of Appearance by Margaret Peg M Dougherty on behalf of Richard Armstrong, Leslie Clement (Dougherty, Margaret)

01/19/2010 8 DEFENDANTS' ANSWER to 1 Complaint, by Richard Armstrong, Leslie Clement. (Dougherty, Margaret)

02/05/2010 9 Corporate Disclosure Statement by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. (Durand, Marty)

02/11/2010 10 SCHEDULING CONFERENCE FORM – LITIGATION PLAN by Richard Armstrong, Leslie Clement, Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. (Piotrowski, James)

02/11/2010 11 CASE MANAGEMENT ORDER ADR Plan to be filed by 5/11/2010. Amended Pleadings due by 5/11/2010. Discovery due by 9/3/2010. Joinder of Parties due

by 5/11/2010. Motions due by 10/15/2010.. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by cjm)

05/25/2010 14 DOCKET ENTRY ORDER – Pending before the Court is the stipulated ADR Plan 13 of the parties filed May 13, 2010. The Court having considered the pleadings shall approve the Plan. IT IS HEREBY ORDERED THAT the parties have agreed to a Settlement Conference to be conducted by the Honorable Candy Wagahoff Dale, Chief Magistrate Judge, United States District Court, for the District of Idaho. IT IS HEREBY ORDERED THAT this matter is referred to Judge Dale for the purposes of conducting a Settlement Conference. Local Rule 16.4. Plaintiff shall contact Amy Hickox, Judge Dales In-Court Deputy at (208) 334-9387 on or before June 4, 2010 to schedule a Settlement Conference, which shall be conducted no later than September 30, 2010. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by sbh)

09/16/2010 15 Joint MOTION for Extension of Time to Complete Discovery Margaret Peg M Dougherty appearing for

Defendants Richard Armstrong, Leslie Clement. Responses due by 10/12/2010 (Dougherty, Margaret)

09/17/2010 16 DOCKET ENTRY ORDER – Before the Court is the Parties' Joint Motion 15 for Extension of Time to Complete Discovery. There being no opposition, and for good cause showing, the Motion 15 is hereby GRANTED. The deadline for completion of discovery shall be extended 45 days to October 18, 2010. Signed by Judge B. Lynn Winmill. (dh)

06/30/2011 27 DOCKET ENTRY ORDER – The parties have notified the Court that they believe this case can be resolved on stipulated facts, in lieu of a bench trial. THEREFORE, IT IS HEREBY ORDERED THAT the parties are to make a determination by July 21, 2011 whether they can reach a stipulation as to the relevant facts. If they are able to do so, they shall file a stipulation on that date; and submit motions for summary judgment on stipulated facts within four weeks, with responses due four weeks thereafter. If they are unable to reach stipulation on the relevant facts, they shall inform the Court July 21, 2011, and the Court will then schedule a bench trial. Signed by Judge B. Lynn Winmill. (sbh)

07/25/2011 28 STIPULATION *of Facts* by Richard Armstrong, Leslie Clement. (Dougherty, Margaret)

08/18/2011 29 MOTION for Summary Judgment James Marshall Piotrowski appearing for Plaintiffs Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. Responses due by 9/12/2011 (Attachments: # 1 Memorandum in Support) (Piotrowski, James)

08/18/2011 30 MOTION for Summary Judgment Margaret Peg M Dougherty appearing for Defendants Richard Armstrong, Leslie Clement. Responses due by 9/12/2011 (Attachments: # 1 Memorandum in Support) (Dougherty, Margaret)

09/15/2011 32 MEMORANDUM in Opposition re 29 MOTION for Summary Judgment filed by Richard Armstrong, Leslie Clement. Replies due by 10/3/2011.(Newell, Charina)

09/15/2011 33 MEMORANDUM in Opposition re 30 MOTION for Summary Judgment filed by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. Replies due by 10/3/2011.(Piotrowski, James)

10/03/2011 34 REPLY to Response to Motion re 29 MOTION for Summary Judgment filed by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. (Piotrowski, James)

10/03/2011 35 REPLY to Response to Motion re 30 MOTION for Summary Judgment filed by Richard Armstrong, Leslie Clement. (Dougherty, Margaret)

10/31/2011 36 Minute Entry for proceedings held before Judge B. Lynn Winmill: Motion Hearing held on 10/31/2011 re 29 Motion for Summary Judgment and 30 Motion for Summary Judgment. Matter taken under advisement. Supplemental briefing shall be limited to 5 pages and is due by 5:00 p.m. on 11/2/2011. (Court Reporter Tammy Hohenleitner.) (jlg)

11/02/2011 37 SUPPLEMENT by Plaintiffs Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc. re 29 MOTION for Summary Judgment. (Piotrowski, James)

11/02/2011 38 SUPPLEMENT by Defendants Richard Armstrong, Leslie Clement re 30 MOTION for Summary Judgment *Supplemental Brief*. (Dougherty, Margaret)

12/12/2011 39 MEMORANDUM DECISION AND ORDER granting 29 Motion for Summary Judgment; denying 30 Motion for Summary Judgment. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by cjm)

01/12/2012 40 MOTION for Reconsideration re 39 Order on Motion for Summary Judgment, Order on Motion for Summary Judgment, Order on Motion for Summary Judgment, Order on Motion for Summary Judgment Margaret Peg M Dougherty appearing for Defendants Richard Armstrong, Leslie Clement. Responses due by 2/6/2012 (Attachments: # 1 Memorandum in Support of Motion for Reconsideration, # 2 Affidavit, # 3 Affidavit, # 4 Exhibit Exhibit A to Pugatch Dec, # 5 Affidavit, # 6 Exhibit Exhibit A to Ballard Dec) (Dougherty, Margaret)

01/13/2012 41 NOTICE of Substitution – Attorney Carl J Withroe for Richard Armstrong,Carl J Withroe for Leslie Clement added. Attorney Charina A Newell terminated. (Withroe, Carl)

01/24/2012 42 RESPONSE to Motion re 40 MOTION for Reconsideration re 39 Order on Motion for Summary Judgment, Order on Motion for Summary Judgment, Order on Motion for Summary Judgment, Order on Motion for Summary

Judgment filed by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. Replies due by 2/10/2012. (Attachments: # 1 Affidavit Declaration of Janna Miller)(Piotrowski, James)

01/24/2012 43 MOTION for Entry of Judgment James Marshall Piotrowski appearing for Plaintiffs Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. Responses due by 2/17/2012 (Attachments: # 1 Memorandum in Support) (Piotrowski, James)

01/24/2012 44 MOTION to Expedite *Consideration of Motion for Entry of Judgment and Motion for Reconsideration* James Marshall Piotrowski appearing for Plaintiffs Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. Responses due by 2/17/2012 (Attachments: # 1 Memorandum in Support) (Piotrowski, James)

02/10/2012 45 REPLY to Response to Motion re 40 MOTION for Reconsideration re 39 Order on Motion for Summary Judgment, Order on Motion for Summary

Judgment, Order on Motion for Summary Judgment, Order on Motion for Summary Judgment filed by Richard Armstrong, Leslie Clement.(Withroe, Carl)

02/17/2012 46 RESPONSE to Motion re 43 MOTION for Entry of Judgment, 44 MOTION to Expedite *Consideration of Motion for Entry of Judgment and Motion for Reconsideration* filed by Richard Armstrong, Leslie Clement. Replies due by 3/5/2012.(Withroe, Carl)

02/23/2012 47 NOTICE by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc. *Plaintiffs' Notice of Supplemental Authority* (Piotrowski, James)

03/06/2012 48 REPLY to Response to Motion re 44 MOTION to Expedite *Consideration of Motion for Entry of Judgment and Motion for Reconsideration* filed by Exceptional Child Center, Inc., Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc.. (Piotrowski, James)

04/12/2012 49 MEMORANDUM DECISION AND ORDER denying 40 Motion for Reconsideration; granting 43 Motion for Entry of Judgment; denying as moot 44 Motion to Expedite. Signed by Judge B. Lynn Winmill. (caused to be

mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (krb)

04/12/2012 50 JUDGMENT. Judgment is entered for Plaintiffs. The relative rights and obligations of the parties are as set out in that Memorandum Decision and Order 39. Signed by Judge B. Lynn Winmill. (caused to be mailed to non Registered Participants at the addresses listed on the Notice of Electronic Filing (NEF) by (krb)

05/11/2012 51 NOTICE OF APPEAL as to 50 Judgment, 49 Order on Motion for Reconsideration, Order on Motion for Entry of Judgment, Order on Motion to Expedite,,, 39 Order on Motion for Summary Judgment,,, by Richard Armstrong, Leslie Clement. (Notice sent to Court Reporter & 9th Cir) (Attachments: # 1 Representation Statement) (Withroe, Carl) (12-35382)

05/14/2012 52 USCA Case Number 12-35382 for 51 Notice of Appeal, filed by Richard Armstrong, Leslie Clement. (cjm)

05/14/2012 53 USCA Scheduling Order as to 51 Notice of Appeal, filed by Richard Armstrong, Leslie Clement. (Notice sent by e-mail to Court Reporter) (cjm)

05/18/2012 RECEIPT: Appeal Filing Fee Fee Received $ 455.00, receipt # 7038 for 51 Notice of Appeal (cjm)

06/08/2012 54 TRANSCRIPT REQUEST by Richard Armstrong, Leslie Clement for proceedings held on 10/31/2011 before Judge Winmill, (Notice sent by e-mail to Court Reporter) (Withroe, Carl)

07/02/2012 55 Transcript filed for dates of 10/31/2011 (Motion Hearing) before Judge B. Lynn Winmill, re 51 Notice of Appeal, Court Reporter/Transcriber Tammy Hohenleitner, Telephone number 208-334-1500. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/26/2012. Redacted Transcript Deadline set for 8/6/2012. Release of Transcript Restriction set for 10/4/2012. (cjm)

07/02/2012 56 Notice of Filing of Official Transcript (cjm)

04/04/2014 57 MEMORANDUM of USCA as to 51 Notice of Appeal, filed by Richard Armstrong, Leslie Clement. AFFIRMED. (cjm)

04/29/2014 58 MANDATE of USCA as to 51 Notice of Appeal, filed by Richard Armstrong, Leslie Clement (cjm)

07/08/2014 59 Letter from Supreme Court of the United States to the United States Court of Appeal for the Ninth Circuit

re Appeal No. 12-35382. The petition for a writ of certiorari in the above entitled case was filed on July 2, 2014 and placed on the docket July 7, 2014 as No. 14-15.(st)

10/03/2014 60 Letter from Supreme Court of the United States, No. 14-15 (9CCA 12-35382). The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. (cjm) (Entered: 10/06/2014)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; LIVING INDEPENDENTLY FOR EVERYONE, INC., Plaintiffs-Appellees, v. RICHARD ARMSTRONG; LESLIE CLEMENT, Defendants-Appellants.	No. 12-35382 D.C. No. 1:09-cv-00634-BLW Relevant Docket Entries

Date Filed	No.	Docket Text
05/14/2012	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellants Richard Armstrong and Leslie Clement on 05/11/2012. Mediation Questionnaire due on 05/21/2012. Transcript ordered by 06/11/2012. Transcript due 07/10/2012. Appellants Richard Armstrong and Leslie Clement opening brief due 08/20/2012. Appellees Exceptional Child Center, Inc, Inclusion, Inc, Living Independently for Everyone, Inc., Tomorrow's Hope

		Satellite Services, Inc. and WDB, Inc. answering brief due 09/18/2012. Appellant's optional reply brief is due 14 days after service of the answering brief. [8176779] (JI)
09/04/2012	10	Submitted (ECF) Opening brief for review. Submitted by Appellants Richard Armstrong and Leslie Clement. Date of service: 09/04/2012. [8309841] (CJW)
09/05/2012	11	Filed clerk order: The opening brief [10] submitted by Richard Armstrong and Leslie Clement is filed. Witnin 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8310125] (RH)
09/07/2012	12	Received 7 paper copies of Opening brief [10] filed by Richard Armstrong and Leslie Clement. [8314970] (SD)
09/07/2012	13	Filed Appellants Richard Armstrong and Leslie Clement excerpts of record in 2 volumes. No certificate of service. [8314994] (RH)

01/18/2013	19	Filed (ECF) Appellants Richard Armstrong and Leslie Clement citation of supplemental authorities. Date of service: 01/18/2013. [8480113] (CJW)
02/01/2013	20	Submitted (ECF) Answering Brief for review. Submitted by Appellees Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc. and exceptional Child Center, Inc.. Date of service: 02/01/2013. [8497335] – [COURT UPDATE: Attached corrected brief. Resent NDA. 02/04/2013 by RY] (JMP)
02/05/2013	21	Filed clerk order: The answering brief [20] submitted by Inclusion, Inc., Living Independently for Everyone, Inc., Tomorrow's Hope Satellite Services, Inc., WDB, Inc. and exceptional Child Center, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8499743] (RH)

02/07/2013	22	Received 7 paper copies of Answering brief [20] filed by Inclusion, Inc., et al. [8504745] (SD)
03/12/2013	25	Submitted (ECF) Reply Brief for review. Submitted by Appellants Richard Armstrong and Leslie Clement. Date of service: 03/12/2013. [8548012] (CJW)
03/12/2013	26	Filed clerk order: The reply brief [25] submitted by Richard Armstrong and Leslie Clement is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8548074] (RH)
03/15/2013	27	Received 7 paper copies of Reply brief [25] filed by Richard Armstrong and Leslie Clement. [8552572] (SD)
07/18/2013	28	Sent Notice requesting electronic excerpts in 14 days. [8710114] (SS)
07/19/2013	29	Submitted (ECF) excerpts of record. Submitted by Appellants Richard Armstrong and Leslie Clement. Date of service: 09/04/2012. [8710354] (CJW)
11/20/2013	39	Filed clerk order (Deputy Clerk: SM): The parties shall be prepared to

		discuss at oral argument whether a conflict exists between state and federal law, as is required to state a claim under the Supremacy Clause, where Plaintiffs-Appellees do not identify a specific state law or regulation that conflicts with 42 U.S.C. § 1396a(a)(30)(A). [8871023] (SM)
12/02/2013	40	ARGUED AND SUBMITTED TO RICHARD C. TALLMAN, CARLOS T. BEA and STEPHEN JOSEPH MURPHY, III. [8883999] (SB)
04/04/2014	41	FILED MEMORANDUM DISPOSITION (RICHARD C. TALLMAN, CARLOS T. BEA and STEPHEN JOSEPH MURPHY, III) AFFIRMED. FILED AND ENTERED JUDGMENT. [9044344] (MM)
04/29/2014	42	MANDATE ISSUED.(RCT, CTB and SJM) [9075766] (RL)
07/08/2014	43	Received notice from the Supreme Court: petition for certiorari filed on 07/02/2014. Supreme Court Number 14-15. [9159989] (RR)
10/03/2014	44	Received notice from the Supreme Court. Petition for certiorari GRANTED on 10/02/2014.The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. Supreme Court Number 14-15. [9265795] (RR)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

INCLUSION, INC., EXCEPTIONAL CHILD CENTER, INC., LIVING INDEPENDENTLY FOR EVERYONE, INC., TOMORROW'S HOPE SATELLITE SERVICES, INC., WDB, INC.,	)	Case No. 09-CV-00634-BLW
Plaintiffs,	)	STIPULATION OF FACTS
v.	)	
RICHARD ARMSTRONG, and LESLIE CLEMENT, in their official capacities,	)	
Defendants.	)	

COME NOW Defendants Armstrong and Clement, by and through their attorneys of record, and the above-named Plaintiffs, by and through their attorney of record, and hereby stipulate and agree to the following facts:

I. The Parties

1. Plaintiffs are five Idaho corporations providing services to Medicaid eligible individuals in the state of Idaho.

2. Defendant Richard Armstrong is the Director of Idaho's Department of Health and Welfare (IDHW), Defendant Leslie Clement is an IDHW Deputy Director and former IDHW Division of Medicaid Administrator with responsibility for administering and operating Idaho's Medicaid Plan at all times relevant to this litigation.

II. Services Provided by Plaintiffs That are the Subject of this Lawsuit

I. Medicaid is a cooperative federal-state program that directs federal funding to participating states to "enable[e] [sic] each state, as far as practicable to furnish medical assistance on behalf of families with dependent children and of aged, blind and disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. §1396-1. Should a state choose to participate in the Medicaid program, it must comply with the requirements of the Medicaid Act. The State

of Idaho has chosen to participate in the Medicaid program.

2. Idaho's Medicaid-covered services are set out in the Medicaid state plan. The State of Idaho also covers certain Medicaid benefits pursuant to waivers approved by the Federal Center for Medicaid and Medicare Services ("CMS"). One such waiver is known as the Developmentally Disabled Home and Community Based Services Waiver ("DD Waiver").

3. Pursuant to the DD Waiver, individuals who qualify to receive medical assistance and rehabilitation services under the Idaho Medicaid state plan and who also meet institutional level of care requirements to receive care in an Intermediate Care Facility for People with Intellectual Disabilities ("ICF/ID") may choose to reside in either their own home and receive Supported Living services or in a Certified Family Home ("CFH"). *See* IDAPA 16.03.10.702.03.

4. Plaintiffs in this case are Residential Habilitation Agencies (RHA) providing Residential Habilitation in Supported Living settings.

5. Residential Habilitation consists of an integrated array of individually-tailored services and supports which are designed to assist eligible participants to reside successfully in the community. These services and supports are set forth in IDAPA 16.03.10.703 and include skills training and/or direct assistance in areas such as decision making, money management, daily living skills, socialization, mobility and behavior shaping or management. Residential

Habilitiation also includes personal assistance services to the participant in daily living activities, household tasks, and routine activities which the individual is unable to accomplish on his or her own, including grooming, bathing, eating, administering medications that are normally self-administered, communication, cleaning, laundry, meal preparation, shopping and the like. Residential Habilitation may also include skills training for participants, their family members and other caregivers.

III. Reimbursement Rates for Residential Habilitation Services/Supported Living

1. Each RHA wishing to offer services reimbursed by Medicaid must execute a Medicaid Provider Agreement. One of the terms of the Medicaid Provider Agreement is that the provider must accept Medicaid reimbursement as the total payment for covered services. Each of the Plaintiffs has executed one or more provider agreements.

2. From March 2001 through November 2002, supported living services provided under the DD Waiver were reimbursed at an hourly rate with an effective cap of $202.60 per day.

3. Effective September 1, 2003, at the request of RHAs providing supported living service and developmental disability agency services, such as developmental therapy, IDHW instituted a "wrap around" service and reimbursement rate. Under the wrap around service, providers could be reimbursed a daily

rate of $242.14 per day for all residential habilitation and supervisory services provided to residents in supported living.

4. Effective October 1, 2004, following onsite observation of participants and survey of RHAs, IDHW initiated acuity based levels of care, and changed reimbursement for wrap around services to $221.12 per day for residents requiring a "High Support" level, and $263.36 per day for residents requiring "Intense Support."

5. Effective July 1, 2006, the IDHW modified the wrap around service rates, changing "High Support" rate to $225.32 per day, and the "Intense Support" rate to $268.36. At the same time, rates for supported living services that were billed on an hourly basis were increased to $12.96 per hour for individual services, and $7.64 per hour for group services. These rates are still effective today.

IV. The IDHWs Studies of Costs for Supported Living Services

1. In 2005 the Idaho Legislature adopted Idaho Code Section 56-118 requiring the IDHW to implement reimbursement rate setting methodologies for various Medicaid services including residential habilitation agency services. As part of its efforts to comply with I.C. §56-118 the IDHW contracted with Johnson, Villegas-Grubb and Associates ("JVGA") to assist in establishing a methodology for reviewing and determining Medicaid reimbursement rates to

private businesses providing community-based services.

2. The first report from JVGA was submitted to the Idaho Legislature on November 30, 2006. JVGA's first report was the result of a survey of Medicaid providers to determine their costs of providing service. Utilizing what JVGA called the "Arizona Model," a proposed reimbursement rate for each service was calculated utilizing a direct service wage component, with additions calculated as a percentage of direct service wages for Employment Related Expenditures, Program Related Expenditures, and General and Administrative Expenses. The JVGA report recommended the following changes in reimbursement rates for residential habilitation services in a supported living environment:

Description	2006 Rate	JVGA Proposed Rate	% Change
Daily Rate – High Support	$225.32	$228.48	1.4%
Daily Rate – Intense Support	$268.36	$342.72	27.7%
Hourly Rate – Individual	$12.96	$18.72	44.3%
Hourly Rate – Group	$7.64	$7.48	-2.1%

3. The IDHW did not modify residential habilitiation [sic] reimbursement rates as proposed

by JVGA, but continued to conduct cost and time studies. The results of the IDHW's studies were reported to the Legislature each year.

4. In 2009, the IDHW compiled the results of its cost studies over the preceding years, made modifications to the "Arizona Model" as proposed by JVGA, and sought CMS approval of an amendment to the DD Waiver to change the method of setting reimbursement rates. The IDHW created a "Summary of Service Codes" based on the available studies which calculated proposed reimbursement rates for certain services based on wage rates, employment related expenditures, program support expenses, paid leave time and general and administrative expenses. The IDHW's 2009 calculation was part of its report to the legislature under I.C. §56-118. The following is a comparison of the 2006 Rates, the JVGA Proposed Rates and the IDHW's 2009 calculations:

Description	2006 Rate	JVG Proposed Rate	IDHW's Proposed 2009 Rate
Daily Rate – High Support	$225.32	$228.48	$248.40
Daily Rate – Intense Support	$268.36	$342.72	$496.56
Hourly Rate – Individual	$12.96	$18.72	$20.68
Hourly Rate – Group	$7.64	$7.48	$8.28

5. The IDHW has not implemented the rates set out in the 2009 calculation for the services at issue in this case.

6. Sheila Pugatch is the Principal Financial Specialist at IDHW. She manages the Office of Reimbursement Policy, which has primary responsibility for setting Medicaid reimbursement rates.

7. Ms. Pugatch directed the IDHW's efforts to conduct cost studies and to calculate proposed reimbursement rates, including the IDHW's 2009 rate proposals. In addition, Ms. Pugatch oversaw the efforts of JVGA to collect and analyze cost data. The result of the JVGA proposal on rates would have been a $4 million increase in state Medicaid expenditures. If the Legislature had appropriated additional funds, the IDHW intended to implement the JVGA proposed rates. The Legislature did not, however, appropriate funds for those increases.

8. The present rate, implemented in 2006, is not based on the cost studies performed between 2006 and 2009. The IDHW would implement the rates set out in the 2009 legislative report if the Idaho Legislature would appropriate the funds to pay them. In the absence of an appropriation, the IDHW has not implemented those rates.

V. Access to Supported Living Services

1. Services covered by the DD Waiver are readily available to eligible participants. There are no

waiting lists for any Medicaid services in Idaho. If a DD Waiver participant chooses to live in their own home and receive supported living services, the participant's service coordinator and care manager assist with providing the participant RHAs in the geographic area to choose from.

2. Currently there are 61 RHAs certified to provide supported living services in Idaho. The following table shows the number of RHAs providing supported living services in each of IDHW's seven regions throughout the state:

Region 1 = 5
Region 2 = 7
Region 3 = 9
Region 4 = 14
Region 5 = 7
Region 6 = 9
Region 7 = 10

3. There are 6,202 participants receiving supported living services. As of the end of calendar year 2010 Plaintiffs submitted claims for supported living services for the following number of participants:

Provider	# of Participants	% of Total
Inclusions Inc.	138	2.2%
Excepitonal Child Center, Inc.	10	.16%
Living Independently For Everyone, Inc.	36	.6%
WDB, Inc.	38	.61%
Total Plaintiffs	222	3.5%

4. The IDHW Critical Incident and Complaint Data Base, used to track all Medicaid benefits and services complaints, including complaints related to access to services, shows no unresolved complaints for supported living services.

5. Jim Whitaker, Operations Director for Plaintiff Inclusions, Inc., testified that Inclusions, Inc. had not ever turned away a prospective client because it could not afford to provide supported living services.

6. James Hutchings, Administrator and owner of Exceptional Child Center, Inc. testified that his agency could take on at least two more supported living clients. To his knowledge his agency had not ever turned away a supported living client.

DATED this 25th day of July, 2011.

HERZFELD & PIOTROWSKI

/s/
JAMES M. PIOTROWSKI
Attorney for Plaintiffs

DATED this 25th day of July, 2011.

OFFICE OF THE
ATTORNEY GENERAL

/s/ Peg M. Dougherty
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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

RECORD AND BRIEFS

No. 14-15

Supreme Court, U.S.
FILED
NOV 17 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Supremacy Clause gives Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against state officials when Congress has not created enforceable rights under that statute.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and reproduced in the appendix to the petition for a writ of *certiorari* ("Pet. App.") at 1. The initial opinion of the United States District Court for the District of Idaho is reported at 835 F. Supp. 2d 960 and reproduced at Pet. App. 15. The district court's decision on the petitioners' motion for reconsideration is unreported and reproduced at Pet. App. 7. The judgment of the district court is reproduced at Pet. App. 5.

JURISDICTION

The court of appeals issued its decision on April 4, 2014. Pet. App. 1. The petition for a writ of *certiorari* was filed on July 2, 2014 and granted, limited to question one presented by the petition, on October 2, 2014. The Ninth Circuit's jurisdiction arose from 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance

> thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

2. A provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), provides:

> A State Plan for medical assistance must –
>
> * * *
>
> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

STATEMENT OF THE CASE

Idaho provides home- and community-based care to Medicaid-enrolled participants as an alternative to

institutionalization. It contracts with providers, who provide the service and are then reimbursed by the State. A group of these providers sued Idaho Medicaid officials, claiming the State's provider reimbursement rates were too low and so preempted by a Medicaid reimbursement provision. Under Ninth Circuit law, the providers had no enforceable rights under 42 U.S.C. § 1983 or the statute itself. The Idaho officials resisted the suit, but the district court allowed the case to proceed anyway based on a Ninth Circuit holding that all a plaintiff claiming preemption need show is Article III standing. The district court found Idaho's reimbursement rates to be too low in violation of the Medicaid Act. It ordered Idaho to raise its reimbursement rates and the Ninth Circuit affirmed.

This case presents the question left open in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012). And it involves the same Medicaid reimbursement statute, 42 U.S.C. § 1396a(a)(30)(A), or § 30(A) for short. We begin with the statutory scheme at issue.

Medicaid. Medicaid is a cooperative federal-state program that offers federal funding to states that provide medical assistance to "families with dependent children, [and] aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. To qualify for federal funding, a state must comport with the Medicaid Act and its implementing regulations promulgated by the Secretary of the U.S. Department of Health and Human Services,

otherwise known as HHS. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

One such criterion for reimbursement – and the one underlying the suit in this case – is that states adopt and submit "plan[s] for medical assistance" to the Centers for Medicare and Medicaid Services – called CMS – for approval. 42 U.S.C. § 1396a(a); *see also* 42 C.F.R. § 430.10. Among other things, these plans must:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

States generally enjoy great flexibility in designing and administering their Medicaid programs. *See Alexander v. Choate*, 469 U.S. 287, 303 (1985).[1]

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[1] This Court has said that Congress has given HHS "exceptionally broad authority to prescribe standards for applying certain sections of the Act." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981). The Secretary of HHS has not adopted any

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A state's flexibility is not unchecked, though. Part of the ongoing relationship between participating states and CMS includes periodic program reviews by CMS, 42 C.F.R. § 430.32(a), and periodic audits conducted by the HHS Office of Inspector General, *id.* § 430.33. If these reviews or audits reveal deficiencies, the state has the opportunity to submit facts in aid of its position or accept CMS's determination and correct any deficiencies. *Id.* § 430.33(c).

If CMS believes a state has failed to correct a deficiency, CMS may initiate a process to withhold federal funds, either entirely or limited to the funds associated with the noncompliant service. 42 U.S.C. § 1396c; 42 C.F.R. § 430.35. If, for example, a state's Medicaid expenditures are inconsistent with its state plan, CMS may disallow the expenditure and force the state to repay federal funds. *See* 42 C.F.R. §§ 430.33(c)(3); 430.42(a); 430.35(d). The state may request a hearing if it disagrees with the disallowance, and private parties, including providers, may participate. *Id.* § 430.76. These parties may conduct discovery and offer opinion and expert testimony. *Id.* §§ 430.83, 430.86, 430.88. CMS's decision is

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regulation addressing how States may demonstrate compliance with § 30(A). In 2011, HHS issued a proposed rule setting forth a comprehensive and detailed approach to demonstrating compliance with § 30(A). 76 Fed. Reg. 26,342, 26,343 (May 6, 2011). No final rule has been adopted and movement on it seems to have stalled.

subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* More often, however, problems are resolved through more informal discussions between the state and CMS.

The services at issue in this case. Medicaid includes a basic bundle of services, but states may receive money to fund, in part, additional services through waivers. Congress authorized the Developmentally Disabled Home and Community Based Services Waiver – known as the DD Waiver – to assist states in funding a variety of non-institutional care options for persons who would be eligible for Medicaid benefits in an institution, but who prefer to live at home or in the community. 42 U.S.C. § 1396n(c)(1); *see also Sanchez v. Johnson*, 416 F.3d 1051, 1054 n.1 (9th Cir. 2005). The services at issue in this case are called "residential habilitation" services.[2] Idaho has had a DD Waiver since 1995 and provides these services through contracted providers, including the respondents here. Like the base Medicaid services, waiver programs involve an ongoing dialogue between the states and CMS to avoid problems and address any that may arise.[3]

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[2] Some requirements of the Medicaid Act may be waived; § 30(A) is not one of them. *See* 42 U.S.C. § 1396c.

[3] The 330-page CMS § 1915(c) technical manual describes the ongoing dialogue between CMS and the participating State once a waiver is approved. It explains, among other things, that these discussions may concern how to improve operations and address issues that arise. *See* "Post Approval Activities," Instructions, Technical Guide and Review Criteria, Centers for

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At no time relevant to this case has CMS ever initiated any compliance action or otherwise complained about the State's rates or its compliance with the DD Waiver.

The rates for the residential habilitation services at issue in this case were increased by the Idaho Department of Health and Welfare, which is the State's Medicaid agency, in 2006. Pet. App. 17. The Department does not typically include the reimbursement rates for these services in its State plan or waiver application documents. (Nor is it required to. It simply must maintain documentation of those rates and make them available to CMS on request. 42 C.F.R. § 447.203.) Rather, the State's DD Waiver documents identify the methods and procedures the Department follows to set rates. Once the Department establishes rates, it publishes them in a pricing file, which is made available to Medicaid providers through Information Releases and is published on the Department's web site. Enrolled providers provide the services and then bill the Department, which reimburses them. The Department then draws its allocation of federal Medicaid money quarterly.

Federal and state regulations limit provider participation to those that agree to accept, as payment in full, the amounts that the state pays them. 42 C.F.R.

Medicare and Medicaid Services, pp. 33-35, *available at* http://www.medicaid.gov/medicaid-chip-program-information/by-topics/waivers/downloads/technical-guidance.pdf.

§ 447.15; Idaho Admin. Code § 16.03.09.210.03. State regulations limit provider reimbursement to the lower of the provider's actual charge or the maximum allowable charge as established by the Department. Idaho Admin. Code § 16.03.10.036.02.

In 2005, the Idaho Legislature adopted a new law directing the Department to compile information relating to the cost of care. *See* Idaho Code § 56-118 (2005) (*amended by* 2011 Idaho Sess. Laws 463). Pet. App. 18. The statute directed the Department to furnish this information to the Legislature annually as part of its budget request. The statute did not, however, require any changes in rates based on the information the Department compiled. Pet. Reply App. 13.

In 2006, the Department hired a firm to conduct surveys to implement § 56-118. The firm produced recommended rates based on varying alternative methodologies for various services each year. Pet. App. 18. The Department did not implement the rates in the firm's reports, but continued to report the information to the Legislature each year. In 2009, the Department proposed rate increases for the services at issue in this case. Pet. App. 19. The Department did not receive an appropriation for the increases from the Idaho Legislature, however, so the Department did not increase the rates.

The proceedings below. The respondents, five residential habilitation services providers, sued petitioner Armstrong, the Director of the Department of

Health and Welfare, and his Medicaid deputy on December 7, 2009. They did not sue the Secretary of HHS or CMS. The providers claimed that based on the new cost information the Department had compiled, the Department's rates were preempted by § 30(A) because they were not consistent with the Ninth Circuit's requirements from *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997). In that case, the court of appeals read § 30(A) to require states to set hospital outpatient reimbursement rates so that they "bear a reasonable relationship" to provider costs, and to "rely on responsible cost studies" before reducing reimbursement rates. *Id.* at 1496. Where rates do not "substantially reimburse providers their costs," a state cannot justify the rates with "purely budgetary reasons." *Id.* at 1499 & n.3.

The providers' case presented another issue. The plaintiffs in *Orthopaedic Hospital* sued under 42 U.S.C. § 1983. 103 F.3d at 1495. But in 2005, in *Sanchez v. Johnson*, the Ninth Circuit held that under *Gonzaga University v. Doe*, 536 U.S. 273 (2002), providers and beneficiaries had no right of action to enforce § 30(A) under § 1983. The court of appeals characterized § 30(A) as having "an aggregate focus, rather than an individual focus that would be evidence of an intent to confer an individually enforceable right." 416 F.3d at 1059. The statute spoke "not of any individual's right but of the State's obligation to develop 'methods and procedures' for providing services generally." *Id.* The court of appeals also concluded that § 30(A) set out "competing policy goals"

and that "[t]he tension between" them "supports a conclusion that § 30(A)" does not "confer[ ] individually enforceable rights on individual Medicaid recipients." *Id.* at 1059-60.

The Ninth Circuit resurrected private enforcement of § 30(A) about three years later, in *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008). California's Medicaid program was again the target of several suits by providers and beneficiaries claiming the state's statutory reimbursement rate reductions violated § 30(A). With no rights enforceable under the Medicaid Act or through § 1983, the plaintiffs in *Independent Living Center v. Shewry* floated a different theory of their claim: the rate reductions were preempted under the Supremacy Clause. The district court had denied the plaintiffs' request for preliminary injunctive relief because, it said, the plaintiffs had no enforceable rights, and could not proceed under the Supremacy Clause as an alternative. *Id.* at 1054. The Ninth Circuit reversed. It wrote that this Court had "repeatedly entertained" preemption claims seeking injunctive relief without requiring the plaintiff to demonstrate any enforceable rights. *Id.* at 1055. In its view, this "Court has consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation." *Id.* at 1055-56. All a plaintiff alleging preemption need show was "traditional standing requirements." *Id.* at 1058.

Under the framework established in *Independent Living Center v. Shewry*, the district court in this case held that the providers could challenge the reimbursement rates directly under the Supremacy Clause. Pet. App. 23. As for the merits, the district court ruled that *Orthopaedic Hospital* controlled. The district court noted that the record "would appear to support" a finding that the then-existing rates were consistent with precisely the things § 30(A) is concerned with: efficiency, economy, and quality of care. Pet. App. 22. And there had been no dispute about access to care, either: The parties agreed that services covered by the DD Waiver were readily available to eligible participants and there was no dispute that there were no waiting lists for any Medicaid services in Idaho. Pet. Reply App. 8-9.

The district court recognized, too, that *Orthopaedic Hospital* and later cases involved rate cuts, not challenges to existing rates. Pet. App. 21. Yet, in light of the more recent cost information, the district court ruled that existing rates failed the requirements of *Orthopaedic Hospital*. Pet. App. 22. "The Court need not wait for evidence of low quality of care or insufficient access to services before intervention is warranted," it said. Pet. App. 22-23. The court granted the providers' motion for summary judgment and issued an injunction requiring that the Department raise its rates to match those proposed in 2009. Pet. App. 24.

The Ninth Circuit affirmed. First, it held that the providers had an implied right of action under the

Supremacy Clause to challenge the state's rates as preempted by § 30(A). Pet. App. 2-3, *quoting Indep. Living Ctr. v. Shewry*, 543 F.3d at 1050 ("Under well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The court of appeals deemed itself bound by circuit precedent and this Court's precedents that it said "have recognized a private right of action under the Supremacy Clause." Pet. App. 3, *citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

On the merits, the court held that, under *Orthopaedic Hospital*, because the state's reimbursement rates did not substantially reimburse providers their costs and remained in place for purely budgetary reasons, the district court correctly granted summary judgment to the providers. Pet. App. 4.

SUMMARY OF THE ARGUMENT

I.A. This Court's cases hold that to enforce a federal statute, a plaintiff must have a federally conferred right and a congressionally intended remedy. Congressional intent is mandatory. Without it, there is no cause of action. This is just as true with Spending Clause statutes like § 30(A). Congress did not create privately enforceable rights in § 30(A).

The statute's references to "methods and procedures," "efficiency," "economy," and a "sufficient" number of providers bear none of the characteristics of the rights-creating language that is necessary to create individually enforceable rights. Indeed, this language demonstrates that Congress intended an agency expert in the statute's subject matter to administer and enforce the statute. The Ninth Circuit ignored the limits this Court has placed on private enforcement of federal statutes.

B. Because Congress has not created enforceable rights, there is no reason to look for alternative sources for a right of action. This Court's cases foreclose such an enterprise. The Court has explained that its prior cases involving the Social Security Act necessarily relied on § 1983 as the basis for the right of action because the Social Security Act did not provide a private right of action. If some alternative source, like the Supremacy Clause, had been available, then the theoretical foundation and understanding of the Court's cases is wrong. It is not wrong, because if it is, then § 1983 is unnecessary since the Supremacy Clause always supplies a private right of action regardless of what Congress has said. The Court has also rejected a plaintiff's third-party beneficiary contract claim to enforce a federal drug-pricing statute that was not directly enforceable. The Court explained that the suit to enforce the contract, which incorporated the statute at issue, was a suit to enforce the statute itself. If the suit could proceed

under the contract, the absence of a private right of action in the statute would be meaningless.

There are two important structural constitutional principles that provide the foundation for this Court's reliance on congressional intent in deciding whether a statute is privately enforceable. The first is the separation of powers. By avoiding judicial intervention when it is not intended, the Court allows Congress to establish a program under its broad spending authority and control the remedial component to fit the substantive scheme it has designed. This permits Congress to leave the often complex details of administering a massive program like Medicaid to an agency expert in the subject matter. This avoids unintended consequences that result from administration by litigation in the federal and state courts around the country.

The other important constitutional interest in play is federalism. The contractual nature of state-federal cooperative programs under the Spending Clause means that the states' participation is dependent on the states voluntarily and knowingly agreeing to the terms of the agreement. Private enforcement under the Supremacy Clause, when it has not been provided for by Congress, changes those terms. One, the Medicaid Act does not contain any statute that would support an implied right of action to enforce § 30(A) or an enforceable right under § 1983. So the States enter into Medicaid with the understanding that their exposure does not include private enforcement lawsuits. Two, the substantive obligations that

inevitably flow from private enforcement of § 30(A) fail the requirement of clear notice. These obligations are not voluntary in any sense when they are unilaterally imposed after the States have joined the program. And the nature of litigation means that States must guess at what will be required of them.

II.A. The Supremacy Clause is no alternative to congressional intent. The text of the Supremacy Clause simply instructs judges and States that the constitution, federal law, and treaties are the supreme law of the land. The Supremacy Clause thus provides a rule of decision. It says nothing at all about authorizing private lawsuits. Unlike some provisions of the Constitution, the Supremacy Clause is not a source of any federal rights.

B. This Court's preemption cases do not support the providers' theory. They reflect a practice of permitting plaintiffs to raise anticipatory defenses to state enforcement proceedings on the grounds that their conduct is immune from state regulation. But this practice is not as open-ended as the Ninth Circuit suggested it was. Rather, preemption cases involve the plaintiff seeking to protect a federal right against state interference. Here, the providers have no federal right to protect, and hence no immunity from state regulation to assert. Their case therefore does not fit the mold established by this Court's preemption cases.

The providers' resort to general equitable principles is not consistent with traditional equity jurisprudence. Equity is not so broad as to provide a remedy where there is not some basis in law for it. With no federal right to protect, the providers cannot invoke this Court's equitable powers to provide a remedy.

III. Finally, even if the Supremacy Clause supports a preemption right of action in some circumstances, it does not provide a right of action for private enforcement of § 30(A). As a cooperative state-federal program, uniformity of administration, flexibility, and cooperation are key features of Medicaid. The program is therefore different than other federal statutes that displace state authority to regulate in a given area. And while some spending statutes impose obligations on states that receive federal funds, § 30(A) simply conditions future payments on state compliance with certain terms. A state retains the choice to accept the federal government's offer or not. The consequence is simply a loss of funding. Section 30(A) is not capable of "preempting" state reimbursement rates. Therefore, the supremacy of federal law is not implicated.

ARGUMENT

MEDICAID PROVIDERS HAVE NO PRIVATE RIGHT OF ACTION UNDER THE SUPREMACY CLAUSE TO ENFORCE § 30(A) AGAINST STATE OFFICIALS

The Ninth Circuit's judgment establishes the Supremacy Clause as implying a private right of action anytime a plaintiff with no more than Article III standing seeks to enforce a federal statute by alleging a state law is preempted by federal law. This expansive view of the Supremacy Clause cannot be squared with this Court's cases in three respects:

First, this Court has consistently held that Congress holds the authority to decide who may enforce federal statutes. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Implying a private right of action to enforce § 30(A) where Congress created no enforceable rights improperly appropriates to the judiciary a function that is reserved for Congress.

Second, the Supremacy Clause does not provide a freestanding private right of action to enforce a federal statute when the plaintiff has no federal right to protect from state interference. It provides a choice-of-law rule, ensuring that federal law applies over conflicting state law. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979). Contrary to the Ninth Circuit's holding and the providers' contentions, this Court's preemption cases are perfectly consistent with that understanding of the Supremacy Clause. The

Ninth Circuit's holding stretches this Court's preemption cases beyond the established boundaries.

Finally, § 30(A) is not capable of preempting a state's Medicaid reimbursement rates in a private enforcement action. The statute does not entitle providers to anything; it merely conditions federal payments on a state's compliance with its terms. Whether the state has satisfied that condition is a determination vested in the Secretary of HHS. This case therefore does not even implicate the supremacy of federal law. The judgment of the court of appeals should be reversed.

I. Implying a Private Right of Action Under the Supremacy Clause to Enforce § 30(A) Improperly Invades Congress's Authority to Provide – or not Provide – Private Remedies for Statutory Violations.

The providers seek to enforce a federal statutory funding condition against State officials to obtain affirmative relief in the form of higher reimbursement rates for their services. They do not contend § 30(A) gives them any rights or that it supplies them with any remedies if a state acts inconsistently with that statute. Indeed, that is the law in the Ninth Circuit, as it is in most every circuit to consider the issue. *Sanchez*, 416 F.3d at 1060-61.[4] In allowing their

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[4] *See Long Term Pharmacy Care Alliance v. Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004); *New York Ass'n of Homes & Servs.*

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case to proceed under the Supremacy Clause anyway, the Ninth Circuit disregarded this Court's cases that limit the enforceability of federal statutes to plaintiffs who can demonstrate a congressionally conferred right and congressionally intended remedy. In other words, the court of appeals "effect[ed] a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting).

A. This Court's cases make clear that whether to provide a private remedy for statutory violations is Congress's choice to make, and Congress has not created enforceable rights in § 30(A).

1. Congress writes the law; part of that authority includes the exclusive prerogative to decide whether a particular federal statute is privately enforceable. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. As Justice Brennan explained for the Court in *Davis v. Passman*, 442 U.S. 228, 241 (1979), "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these

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for the Aging v. DeBuono, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 703-04 (5th Cir. 2007); *Westside Mothers v. Olszewski*, 454 F.3d 532, 542-43 (6th Cir. 2006); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-49 (10th Cir. 2006).

rights and obligations, to determine in addition, who may enforce them and in what manner." *See also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011).

Sometimes, though rarely, a statute expressly authorizes private suits. Other times, when the statute does not expressly authorize suit, a court may conclude that a private right of action is nonetheless implied from the statute if Congress intended to create a private right and a remedy for its violation. *Alexander*, 532 U.S. at 286-87; *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) ("recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy."). In some other instances, the remedy for a violation of a federal right (by someone acting under color of state law) is provided by 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. at 284.

The remedial component of a federal statute is therefore not divorced from the substantive component: Congress retains control of each. Congress has not assigned the judiciary the task of creating private remedies anytime the law is violated. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) ("In the absence of congressional intent the Judiciary's recognition of an implied right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.'"),

quoting Am. Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951).

Even if a statute reveals that *a* remedy might be available to *some* plaintiff, a violation of the law is not, by itself, enough. Not only must there be some congressionally intended remedy, but Congress must have intended to create a right, as well. *Sandoval*, 536 U.S. at 286; *Cort*, 422 U.S. at 78 (first factor in deciding whether there is a private right of action asks, "Does the statute create a federal right in favor of the plaintiff?"). The need for a federal *right* extends to cases brought under 42 U.S.C. § 1983, too: In such cases "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *see also Gonzaga Univ.*, 536 U.S. at 285 ("A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context.").

Congressional intent is not advisory. It is "dispositive." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Sandoval*, 532 U.S. at 286 (statutory intent to create a remedy is "determinative"). Absent congressional intent to create a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible it might be with the statute." *Sandoval*, 532 U.S. at 287; *see also California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a

remedy on a statute, no matter how salutary, that Congress did not intend to provide."). And when it comes to federal funding conditions, they are not privately enforceable "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous intent to confer individual rights.'" *Gonzaga Univ.*, 536 U.S. at 280, *quoting Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981).

2. Congress did not create privately enforceable rights in § 30(A), as the Ninth Circuit recognized in *Sanchez*. The providers do not contend otherwise. Instead, § 30(A) provides guideposts that leave room for flexibility depending on the specific needs of a state's demographic and geographic factors. State plans must adopt "methods and procedures" to assure CMS that a state's reimbursement payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers" to ensure Medicaid participants have access to care to the same extent the general population in a given area has it. This language is "broad and general," *Independent Living Center*, 132 S. Ct. at 1210, and by its reference to a "sufficient" number of providers the statute demonstrates concern for access to quality care. *Sanchez*, 416 F.3d at 1059. The statute's focus, therefore, is on "'the aggregate services provided by the State,' rather than 'the needs of any particular person.'" *Gonzaga Univ.*, 536 U.S. at 282, *quoting Blessing*, 520 U.S. at 340. There is, accordingly, no "*individual* entitlement" to specific rates or rates based on specific factors. *Blessing*, 520 U.S. at 343.

Section 30(A)'s broad language and competing policy goals also demonstrate that Congress intended agency, rather than private enforcement. *See Gonzaga Univ.*, 536 U.S. at 282 (to establish a right enforceable through § 1983, the statute at issue must "not [be] so vague and amorphous that its enforcement would strain judicial competence") (internal quotations omitted); *Indep. Living Ctr.*, 132 S. Ct. at 1210 (§ 30(A)'s "broad and general" language suggests "that the agency's expertise is relevant in determining its application."). This Court characterized the "reasonable efforts" standard in *Suter v. Artist M.*, 503 U.S. 347 (1992), as evidence that "[h]ow the State was to comply with this directive, and with the other provisions of the Act, was, within broad limits, left up to the State." *Id.* at 360. The "substantial compliance" provision in *Blessing* was a "yardstick for the Secretary to measure the *systemwide* performance of a State's Title VI-D program." 520 U.S. at 343. Nonspecific "methods and procedures" to assure a "sufficient" number of providers is not different in nature than the similarly broad provisions at issue in *Blessing* or *Suter*.

The upshot of all this is that Congress has defined the terms on which it will grant money to states to provide Medicaid services. It has not included among those terms authorization for private litigants to sue state officials to enforce § 30(A)'s broad and general terms. This Court's cases say that congressional intent to create – or not create – private remedies for statutory violations matters; the Ninth Circuit says it does not. The Ninth Circuit is wrong.

B. Because Congress has not authorized private enforcement of § 30(A), there is no basis for the Court to depart from its cases and look elsewhere for a private remedy.

When the statute at issue reveals no intent to create rights or remedies, that is the end of the matter and there is no basis to look elsewhere for a private suit. This Court has put it succinctly: "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Gonzaga Univ.*, 536 U.S. at 286; *see also Horne v. Flores*, 557 U.S. 433, 456 n.6 (2009) ("Whether or not HB 2064 [a state statute] violates § 7902 [of the No Child Left Behind Act], neither court below was empowered to decide the issue. As the Court of Appeals itself recognized, NCLB does not provide a private right of action."). The Ninth Circuit ignored those precedents – and Congress's will – when it allowed the providers' action to move forward. There is no reason to exempt the providers from the requirements this Court has established.

1. The Ninth Circuit's judgment is inconsistent with this Court's well-established cases that limit the enforceability of federal statutes. The first of these is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that § 1983 was not limited to constitutional provisions, but was available to enforce federal statutes, including the Social Security Act. The Court

explained that this interpretation of § 1983 was confirmed by earlier Social Security Act cases where "§ 1983 was necessarily the exclusive statutory cause of action because, as this Court held in *Edelman v. Jordan*, [415 U.S. 651, 673-74 (1974)], the SSA affords no private right of action against a State." 448 U.S. at 6. The assumption, then, was that when the Social Security Act fails to authorize a private enforcement action of its terms, the *only* basis for a private suit is § 1983.

But the Ninth Circuit said that § 1983 is not the exclusive basis for a private right of action to enforce § 30(A). If the Ninth Circuit is correct, the Court's theoretical foundation in *Thiboutot* and the cases it cited was wrong. If the Supremacy Clause *also* had been available, there would have been no basis to say that § 1983 was the exclusive enforcement mechanism. Section 1983 would not have been necessary because the Supremacy Clause would have authorized enforcement of Social Security Act statutes irrespective of whether the plaintiffs had any rights. The Ninth Circuit's judgment determines who may enforce a statute based solely on magic words in a complaint rather than the substance of the claim: The preemption plaintiff may proceed; the § 1983 plaintiff may not. If the Ninth Circuit's holding is correct, then the claims in *Suter*, *Blessing*, and *Sandoval* could have simply been recast as preemption cases. Section 1983 thus becomes superfluous. Because the providers have no rights enforceable through § 1983, *Thiboutot* forecloses the providers' claim.

The Ninth Circuit's judgment runs into *Astra USA*, as well. There, this Court rejected the plaintiffs' attempt to enforce a statute (that was not privately enforceable) as a third-party beneficiary to a contract between drug manufacturers and the federal government. The statute at issue had been incorporated into the contract. 131 S. Ct. at 1345. The plaintiff, Santa Clara County, complained that the drug manufacturers were overcharging for their drugs in violation of the pricing agreement between the manufacturers and HHS. *Id.* at 1347. Everybody agreed that the statute at issue contained no private right of action. *Id.* The Court explained that the county's suit was "in essence a suit to enforce the statute itself." *Id.* at 1348. The absence of a private right of action to enforce the statute could not be overcome by the third-party beneficiary theory because if it could, "the absence of a private right of action to enforce the statutory ceiling price obligations would be rendered meaningless." *Id.* Private suits "to enforce ceiling-price contracts running between drug manufacturers and the Secretary of HHS are incompatible with the statutory regime." *Id.* at 1345.

Just as the Court rejected Santa Clara County's alternative third-party beneficiary right of action theory, so too should the Court reject the providers' alternative Supremacy Clause theory. Their "pre-emption" claim is plainly an attempt to enforce a term of the agreement between CMS and Idaho. In this sense, the providers here are like third parties seeking to enforce the benefit of a contract party's

obligations. But under contract principles, third parties may enforce a contract only if they are the intended, rather than incidental, beneficiaries of the contract and only if enforcement by them "is appropriate to effectuate the intention of the parties." Restatement (Second) of Contracts, § 302(1) (1981). The providers have no rights under the statute and they are plainly not the intended beneficiary of the State's § 30(A) obligations owed to CMS. The statute does not speak of providers individually, it does not express any intent to benefit them, and it does not require any specific rate or methodology to ensure provider costs are covered. When Congress has not made the statute enforceable there is no need to look elsewhere.

2.a. Two important structural constitutional principles are served by the Court's reliance on congressional intent when deciding whether a statute is privately enforceable. First, deference to congressional intent furthers separation-of-powers principles by preventing judicial intrusion into a congressional function. The decision whether a statute is enforceable "has significant consequences for the reach of federal power." *Stoneridge Inv. Partners, LLC*, 552 U.S. at 165. These limitations on court-implied rights of action therefore "reflect[] a concern, grounded in the separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990).

The Court's approach serves more than abstract separation-of-powers ideals. It delivers the tangible benefit of averting judicial involvement in federal programs where it may not be intended or appropriate. *Gonzaga Univ.*, 536 U.S. at 282. This, in turn, allows Congress to design the mechanics of the solution to the problem it is attempting to solve without unwanted outside tinkering. The Court's cases reflect an understanding that in some instances, particularly in Spending Clause cases, Congress establishes a program, writes the statutes, and leaves it to the implementing agency, rather than the judicial branch, to work out the details. *See Blessing*, 520 U.S. at 345 (statute requiring "sufficient" staffing levels did not create private rights enforceable through § 1983; "Enforcement of such an undefined standard would 'strain judicial competence.'").

Such is the case with Medicaid. The agency is "comparatively expert in the statute's subject matter." *Indep. Living Ctr.*, 132 S. Ct. at 1210. Medicaid's cooperative nature, complex design, and often broadly worded standards allow the federal and state experts who have to manage the program decide how best to deliver quality services in an efficient and economical way. By not creating privately enforceable rights, Congress intended that a single federal agency expert in the subject matter administer the program and interpret and apply the statute in a uniform manner and in cooperation with the states, rather than leaving the myriad complex details to be determined case by case by the many state and federal courts across

the Nation. *See, e.g.*, *Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (when "statute's key language is broad and nonspecific," Congress may have intended agency remedy to be exclusive "both to achieve the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking and to avoid the comparative risk of inconsistent interpretations that can arise out of an occasional inappropriate application of the statute in a private action for damages.").

The practical benefits of agency administration of a program – "expertise, uniformity, wide-spread consultation, and resulting administrative guidance," for example – can be stifled by judicial applications that perhaps unintentionally but inevitably narrow and harden intentionally broad and flexible standards. This is especially so where the agency that administers the program is not a party to the case. Without that input, the courts are left to fill perceived generalities with specific requirements that may not serve Congress's goal and will interfere with CMS's centralized, expert administration of the program.

This case provides an example of the tangible benefits that are lost when private litigants inject the federal courts into the administration of Medicaid in a way that Congress did not intend. The court of appeals affirmed an injunction requiring Idaho to raise its rates based on little more than cost-study information that never withstood any scrutiny. It did this despite the fact that CMS had never found Idaho's rates to be deficient. It did this even on

agreed-upon findings and a concession by the district court that the goals of § 30(A) had been met. Section 30(A)'s text makes plain that it is concerned with a variety of competing interests that must be balanced in establishing payment rates. The end goal is "efficiency" and "economy" and access to quality care, but Congress decided that the agency and the states are better positioned than the federal judiciary to make these calls. Even the Ninth Circuit acknowledged this self-evident truth. *See Sanchez*, 416 F.3d at 1059-60 ("the interpretation and balancing of the statutes and competing goals would involve making policy decisions for which this court has little expertise and even less authority."). The Ninth Circuit has not explained why § 30(A) is not suitable to judicial enforcement under § 1983, but is when the claim is preemption.

The Ninth Circuit's judgment elevates one § 30(A) factor – reimbursement rates – above the other factors that must be balanced to achieve efficiency, economy, and access to quality care. Private enforcement of § 30(A) therefore could have sweeping implications affecting the balancing act that CMS and states must do. For example, waiver programs must comply with cost-neutrality rules, under which states must show that the annual cost of the services is not more than the annual cost of institutional services. 42 U.S.C. § 1396n; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999). Singular concern with provider reimbursement regardless of the other factors may undermine a program's cost neutrality. And a narrow focus on provider cost may perpetuate

inefficiencies that § 30(A) is designed to prevent. These are all complex matters that Congress left to CMS to address with the states. If the Ninth Circuit's decision is correct, and congressional intent is irrelevant, this Court's "careful approach," *Stoneridge Inv. Partners*, 552 U.S. at 164, and its attendant benefits, are rendered meaningless.

b. The Ninth Circuit's intrusion into congressional territory is unwarranted for yet another reason: Private enforcement of funding conditions like § 30(A) imposes on states requirements they did not bargain for. Spending statutes that grant money to states on the condition of their compliance with various requirements have been often characterized as "much in the nature of a contract" between the state and federal government. *Pennhurst*, 451 U.S. at 17; *Barnes v. Gorman*, 536 U.S. 181, 186 (2002).[5] Congress can invoke its spending power to entice states to do things it may not be able to under its enumerated powers. *New York v. United States*, 505 U.S. 144, 166-67 (1992). So "[t]he legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451

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[5] Not all contract rules apply to funding conditions, *see Bennett v. Kentucky Dep't of Ed.*, 470 U.S. 656, 669 (1985), but the Court has used the analogy to support the basic principle that state acceptance of funding conditions must be voluntary and knowing. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

U.S. at 17. The nature of the state-federal relationship established by spending legislation is thus defined by the states' voluntary assent to the terms of the deal.

Private suits to enforce § 30(A), and the resulting judicially imposed requirements, unilaterally change the terms of the deal. The Medicaid Act is an elaborate set of bilateral commitments that states decide whether to make based on their assessment of the relative risks and benefits of participating. Section 30(A) says that to receive funding, states need do no more than to assure CMS in their state plans that they have adopted "methods and procedures" to ensure "sufficient" access to quality care. States know that they have to convince CMS that their methods and procedures will ensure sufficient access to quality care. They know, too, that if they cannot convince CMS that their methods and procedures will ensure sufficient access, or if they administer their plans in a way that fails a term of the Medicaid Act, they will lose federal money. The specific manner in which CMS will enforce the Act's provisions is set forth in the Act and HHS's implementing regulations. And states know Medicaid may be amended (within limits), at which point they can choose whether to continue to seek federal funding for providing care under their Medicaid programs.

But the Medicaid Act hardly puts the states on notice that they can be forced by private parties with nothing more than Article III standing to find money to meet judicially mandated obligations that are not spelled out in the Act and that CMS has not required.

First, where Congress has not unambiguously provided for private enforcement of § 30(A), private suits in contravention of Congress's intent do not meet the Court's clear notice requirement. *See Gonzaga Univ.*, 536 U.S. at 280. A state's calculus in deciding whether and how to participate in Medicaid necessarily includes the ability of third parties to correct perceived deficiencies in the state's performance of its obligations by suing state officials in federal court. The state's obligations in § 30(A) are owed to CMS, not providers, and there is no plausible argument that the providers are the intended beneficiaries of that statute. Under this Court's precedents, parties who do not meet the requirements for an implied right of action or a suit under § 1983 do not have a cause of action to enforce a particular statute, and so the states participate in Medicaid with the understanding that § 30(A) is not privately enforceable.

Second, the states' exposure to the substantive requirements that private enforcement produces materially alter the agreement between the state and CMS. Cooperation and negotiation and flexibility are part of the program. But private suits impose non-negotiable funding conditions that Congress did not intend and the states did not agree to. These post-acceptance judicially created funding conditions leave states little choice because they change the rules in the middle of the game. *See Pennhurst*, 451 U.S. at 25 (Congress's broad spending power "does not include surprising participating States with post-acceptance or 'retroactive' conditions."). When obligations are

imposed on states on an ad-hoc basis through the rigid, unpredictable adversarial forum federal litigation prescribes, states have to guess at what might be required. The resulting obligations cannot be voluntary. *See id.* at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.").

This case illustrates the problem vividly. The Ninth Circuit expanded its obligations from rate cuts to hospitals to *existing* rates for a completely different class of service providers. It imposed minimum reimbursement levels based on nothing appearing in § 30(A). And the court of appeals replaced broad and general statutory terms with ambiguous ones of its own that leave still other questions that can only be resolved through yet more litigation: What is a "responsible cost study"? What does "substantially reimburse" mean? What triggers an obligation to reevaluate rates and adjust them upward? What if meeting the "substantially reimburse" requirement negates efficiency and economy? These are all matters that are ordinarily resolved through the State's discussions with CMS. But in the context of federal litigation by private parties, the State cannot possibly have clear notice of the terms that the Ninth Circuit has imposed and will impose if private parties may continue to enforce § 30(A). Justice Kennedy captured the problem of judicially implied causes of action in spending statutes thusly:

> When the statute at issue is a Spending Clause statute, this element of speculation is

> particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds. . Accordingly, the Court must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability.

Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 656-57 (1999) (Kennedy, J., dissenting). The Court's limitations on private rights of action serve important structural constitutional interests. The lower courts must not be permitted to clear alternative paths. *See Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (in the absence of private remedy to enforce statute, a private right of action under Court's "general equitable powers would raise the most serious questions regarding the separation of powers and federalism.").

II. The Supremacy Clause Does Not Provide an Alternative, Freestanding Private Right of Action to Enforce Federal Statutes When the Plaintiff Has no Right to Protect Against State Interference.

The providers' preemption theory and the Ninth Circuit's judgment suffer the same analytical defect: If the Supremacy Clause always supplies a private

right of action to enforce a federal statute, that means Congress no longer controls when statutes are privately enforceable. Indeed they are all privately enforceable. This Court has never held this to be the case, and it should not now. For good reason: "[I]f Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause itself must provide one." *See Indep. Living Ctr.*, 132 S. Ct. at 1212 (Roberts, C.J., dissenting). By invoking the Supremacy Clause and preemption, the providers have attempted to put the Supremacy Clause to the wrong use.

A. The Supremacy Clause provides a rule of decision, not a right of action.

The general principle that federal law is the supreme law of the land is not in dispute. Before a court concludes, however, that the Supremacy Clause also authorizes private statutory enforcement actions invoking preemption, it should consider what the Supremacy Clause says. It says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. This is a directive to the "Judges in every State" that they are bound to follow the Constitution, federal laws, and treaties, as they are the "supreme Law of the Land," whatever state constitutions or laws might say.[6] Nothing in the text of the Supremacy Clause authorizes private litigants to sue state officials on the mere allegation that a state law conflicts with federal law.

That authorization must come from somewhere else. The providers will no doubt characterize their claim as a "constitutional" claim, seeking to vindicate the supremacy of federal law. They are not seeking to enforce the statute, the theory will go, they are enforcing the structural constitutional principle of federal supremacy that the Supremacy Clause declares. That argument must fail. The Supremacy Clause is not a "source of any federal rights." *Chapman*, 441 U.S. at 613; *Golden State Transit Corp.*, 493 U.S. at 107. Instead, it "'secure[s]' federal rights by according them priority whenever they come into conflict with state law." *Chapman*, 441 U.S. at 613. In this sense, the Supremacy Clause is different than, for example, the Commerce Clause, which "of its own force imposes limitations on state regulation of commerce and

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[6] Except for a one-year run in 1801, federal-question jurisdiction did not exist in the lower federal courts until 1875. Thus, state-court judges would have regularly resolved federal law-based questions that are now decided in large measure by the lower federal courts. The Supremacy Clause provided then, as it does now, a choice-of-law rule for them when presented with conflicting state and federal laws.

is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis v. Higgins*, 498 U.S. 439, 450 (1991). It is different than the Takings Clause (U.S. Const. amend. V), the right to habeas corpus (U.S. Const. art. I, § 9, cl. 2), the freedom of speech (U.S. Const. amend. I), and the freedom from illegal searches and seizures (U.S. Const. amend IV). The purpose of the Supremacy Clause, then, is "to ensure that, in a conflict with state law, whatever Congress says goes." *Indep. Living Ctr.*, 132 S. Ct. at 1211 (Roberts, C.J., dissenting). While the Supremacy Clause *resolves* the conflict, it says nothing about *who may present* that conflict in the first place. *See Davis v. Passman*, 442 U.S. at 239 n.18 ("*cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court").

It is therefore incorrect to say that the providers' enforcement action is permitted by the Supremacy Clause *even though* Congress did not create enforceable rights under the statute simply because they have cast their claim as "constitutional" under the Supremacy Clause. *See Swift & Co. v. Wickham*, 382 U.S. 111, 121 (1965) ("the Supremacy Clause gives superiority to valid federal acts over conflicting state statutes[,] but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment."). The Court in *Swift* held that the claim that a state regulatory statute violated a federal statute was not

"upon the ground of the unconstitutionality of such statute," which was a requirement for a three-judge court under former 28 U.S.C. § 2281. *Id.* at 126-27. The providers cannot overcome congressional intent by characterizing their claim as something that it is not. The Supremacy Clause simply tells courts (and states) that federal law prevails over conflicting or displaced state law. That rule of decision does not disable Congress from deciding whether a particular statute may be privately enforced. The Ninth Circuit has, however, effectively removed that congressional authority.

B. This Court's preemption cases do not support the providers' cause of action.

In disposing of Idaho's appeal, the Ninth Circuit said that "[u]nder well-established law of the Supreme Court, this court, and the other circuits, a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law." Pet. App. 3, *quoting Indep. Living Ctr. v. Shewry*, 543 F.3d at 1065. In the lower court's view, this Court's cases "have recognized a private right of action under the Supremacy Clause." Pet. App. 3, *citing Shaw*, 463 U.S. at 96 n.14. The Ninth Circuit has this wrong: In no case has the Court decided if or when a plaintiff lacking enforceable rights nevertheless may bring an equitable claim directly under the Supremacy Clause to enforce a statute. The Ninth Circuit misread what this Court's cases reveal about preemption claims.

1. A conflict between state and federal law – a preemption claim, in other words – may arise in two ways. First, an entity may raise federal preemption as a defense in a proceeding against it under state or local law. *See, e.g., Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). In that example, federal preemption was raised as a defense in a suit where the federally regulated entity was subject to liability under District of Columbia tort law. The defendant argued that federal law displaced the local tort law, shielding it from liability under the local law. The second way in which a preemption claim arises is when a party files a lawsuit and asserts preemption as an anticipatory defense to state enforcement or regulation of the plaintiff's conduct. *See Shaw*, 463 U.S. at 95-97. The justification for this is to protect people from the Hobson's choice of violating the state law at the risk of potentially tremendous liability or complying with the state law and enduring the injury until (if ever) the state law is invalidated. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992).

The providers relied on *Ex parte Young*, 209 U.S. 123 (1908) and a series of related cases to justify their argument. *Ex parte Young* provides the well-used example of preemption raised as an anticipatory defense to state enforcement proceedings, but it does not help the providers' cause in this case. In *Young*, which is also known for establishing a limit on state sovereign immunity, a railroad shareholder claimed that Minnesota's limitations on freight-rail charges were unconstitutional and obtained an injunction

against Minnesota's attorney general, prohibiting him from enforcing the state's rate limits. The shareholder's suit was not premised on a Supremacy Clause cause of action. As Justice Kennedy has explained, the shareholder's suit was "nothing more than the pre-emptive assertion in equity of a defense that would have been available in the State's enforcement proceedings at law." *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1643 (2011) (Kennedy, J., dissenting); *see also* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997 (2008) (explaining the bill in equity to "restrain proceedings at law").

This assertion in equity of a preemption defense is not as free-ranging and open-ended as the Ninth Circuit would have it. The Court in *Young* carved out a limited exception to a state's sovereign immunity. As such, it removed a bar to an otherwise actionable claim of constitutional impairment – there, an alleged violation of the shareholders' due process and equal protection rights under the Fourteenth Amendment. This limited exception to sovereign immunity does not, however, also authorize *every* lawsuit where the plaintiff alleges the state law is preempted. It is more limited than that. *Young* and the Court's preemption cases spawning from it reveal something in common that is lacking here: They presented state action that interfered with the plaintiffs' conduct or property that was, by federal law, properly free of state regulation. In other words, the plaintiff had a federal right that the state law interfered with. The Ninth Circuit's holding disregards this component.

The Ninth Circuit in this case cited *Shaw*, but *Shaw* does not support the Ninth Circuit's holding. For one thing, the footnote in *Shaw* that the Ninth Circuit cited involved the question of jurisdiction. 463 U.S. at 96 n.14. The question of jurisdiction is a different matter than the question whether a cause of action exists.[7] Still, *Shaw*'s facts fit the *Ex parte Young* mold because the plaintiff was asserting an anticipatory defense to the state's regulation of its conduct. An employer's ERISA-covered employee benefit plan was subjected to New York's laws relating to pregnancy discrimination in employee benefit plans. But under 29 U.S.C. § 1144(a), state laws relating to ERISA-covered employee benefit plans were preempted. The employer's preemption case thus presented an anticipatory defense of preemption by the claim that its benefit plan was, by ERISA, immune from state regulation. *Id.* at 92; *see also id.* at 96 n.14 ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with *federal rights*.") (emphasis added). The federal right at stake there was immunity from the state's pregnancy discrimination laws. The providers here seek no immunity from state regulation; they have no anticipatory defense to assert.

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[7] Jurisdiction is jurisdictional; a cause of action is not, so cases may have proceeded on an arguable but undecided cause of action. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002).

The same holds for the other cases the Ninth Circuit has said show this Court has "consistently assumed – without comment – that the Supremacy Clause provides a cause of action to enjoin implementation of allegedly unlawful state legislation." *Indep. Living Ctr. v. Shewry*, 543 F.3d at 1056; *see City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (city ordinance prohibiting aircraft from departing at certain times); *Ray v. Atlantic Ritchfield Co.*, 435 U.S. 151 (1978) (Washington statute regulating substantive aspects of oil tankers in Puget Sound); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (state statutes providing for training, testing, and licensing of hazardous waste site workers); *Pac. Gas & Elec. Co. v. State Energy Resources Comm'n & Dev't Comm'n*, 461 U.S. 190 (1983) (state statutes limiting conditions of when nuclear power plant could be built and imposing moratoriums on construction of new plants until state conditions were met); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state statute prohibiting transportation or sale in California of avocados according to certain oil content). In these cases, state or local law attempted to regulate the activities of a party who alleged it was immune by federal law from that local regulation.

Preemption claims, then, depend on the plaintiff's ability to assert an independent federal right that is impaired by state regulation. *See Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1638; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("the

Young doctrine has been accepted as necessary to permit the federal courts to vindicate *federal rights* and hold state officials responsible to 'the supreme authority of the United States.'"), *citing Young*, 209 U.S. at 160 (emphasis added); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (under the Supremacy Clause, courts determine "validity" of state law that "come[s] into collision with an act of Congress, and deprive[s] a citizen *of a right* to which that act entitles him.") (emphasis added); *id.* at 211-12 ("when a Legislature attaches certain privileges and exemptions to the exercise of a right over which control is absolute, the law must imply a power to exercise the right."); *Va. Office for Prot. & Advocacy*, 131 S. Ct. at 1643 (Kennedy, J., dissenting) ("it must be assumed that VOPA has a federal right to the records it seeks, and so the extension of *Young* would vindicate the Supremacy Clause.").

The providers contended below that the Court has reached the merits in preemption cases without requiring that the standards for § 1983 be met. It is true that preemption cases do not necessarily mention § 1983. But it does not follow that there was not a federal right at issue. In many of this Court's preemption cases, the plaintiffs were plainly asserting anticipatory defenses to state laws that impaired federal rights. *See, e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (California political subdivision rules regulating vehicle fleets alleged to be preempted by Clean Air Act); *Verizon Md.*, *supra*, 535 U.S. 635 (suit by telecommunications

provider asserting state commission order requiring payments to competitor preempted by federal Telecommunications Act); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (suit by towing company against city claiming city ordinance regulating tow trucks preempted by federal Interstate Commerce Act); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (mining company alleged state permit requirement for mining development preempted by federal Coastal Zone Management Act, Mining Act, and U.S. Forest Service regulations). These cases are of the same species as those relied on by the Ninth Circuit in that they involved the preemptive assertion of a federal right to be free of state regulation. *See also Golden State Transit*, 493 U.S. at 115 (Kennedy, J., dissenting) (expressing the view that even though § 1983 was unavailable to the employer against the city, NLRA gave the employer "an immunity from the city's interference with the NLRA.").

In another category of cases, the question whether the plaintiff could maintain a cause of action directly under the Supremacy Clause was either not argued or not decided and so it was at most, assumed without examination. *See Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006); *Wos v. E.M.A.*, 133 S. Ct. 1391, 1405 (2013); *PhRMA v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (questioning whether petitioner was entitled to bring preemption suit as third-party beneficiary but that "Respondents have not advanced this argument

in this case."). Since the issue was not decided in these cases, they do not support an argument that the Court has endorsed a Supremacy Clause cause of action absent a federal right. *See Brecht v. Abrahamson*, 507 U.S. 619, 630-631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

Here, § 30(A) creates in the providers no legal right that the Supremacy Clause protects. The providers are subject to no enforcement action like the plaintiffs in *Shaw* and *Atlantic Ritchfield* and *Florida Lime & Avocado Growers* and *Gade* would have been. Idaho simply does not regulate their activity in a manner that would lead to an immunity defense. *See, e.g., Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("the respondents are not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*. They simply seek a private cause of action Congress chose not to provide."). The Ninth Circuit's judgment expands *Ex parte Young* – and with it, the limited exception to sovereign immunity – beyond the boundaries this Court has set.

2. The providers' resort to more general principles of equity is not consistent with this Court's cases, and it is not consistent with traditional equity jurisprudence. It assumes equity will always step in, even in the absence of a basis in law. This is not correct. The Chief Justice explained in his *Independent Living Center* dissent:

> It is a longstanding maxim that "[e]quity follows the law." 1 J. Pomeroy, Treatise on Equity Jurisprudence § 425 (3d ed. 1905). A court of equity may not "create a remedy in violation of law, or even without the authority of law." *Rees v. Watertown*, 19 Wall. 107, 122, 22 L.Ed. 72 (1874).

132 S. Ct. at 1213 (Roberts, C.J., dissenting). Equity jurisdiction is not so broad as to allow the providers' case to proceed where Congress has not authorized it or where they are not protecting a right against State interference. *See* 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 19 (14th ed. 1918) ("If indeed a Court in Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 658 (1873) (court of equity may not "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles"); *I.N.S. v. Pangilinan*, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard

constitutional requirements and provisions than can courts of law.'"). Thus, this Court's equitable powers are constrained by principles of separation of powers, congressional intent, and sovereign immunity. *Sandoval*, 532 U.S. 275; *Blessing*, 520 U.S. 329; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Pennhurst*, 451 U.S. 1; *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (the "contractual nature" of Spending Clause statutes "has implications for our construction of the scope of available remedies."). The providers' theory ignores these limitations.

Reliance on equity does not absolve the providers of their need to demonstrate interference with a federal right. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939); *see also* Pomeroy, at §§ 89-107 (describing "primary rights," the violation of which may give rise to an equitable "remedial right"). The Court's equity cases establish important limiting principles that the Ninth Circuit's holding obliterates. Under its view, every federal statute is enforceable against state officials. But because the providers have no rights to protect against State interference, equity will not deliver the Supremacy Clause to rescue their case from a fate this Court's precedents have prescribed.

III. Even if the Supremacy Clause Authorizes Preemption Claims Against State Officials in Some Circumstances, It Cannot Supply a Private Right of Action to Enforce § 30(A).

There is still another reason why this Court should not recognize a nonstatutory right of action to enforce § 30(A). That reason is the nature of § 30(A) itself. The providers' characterization of their case as being one of "preemption" uses that term "in a rather special sense," because their claim "does not involve arguable federal pre-emption of a wholly independent State program dealing with the same or a similar problem." *New York State Dep't of Social Servs. v. Dublino*, 431 U.S. 405, 411 n.9 (1973). Medicaid as a whole is full of often broadly worded and complicated rules. Uniformity, flexibility, and cooperation are key features of this program. *See, e.g., Wos v. E.M.A.*, 133 S. Ct. at 1405 (Roberts, C.J., dissenting) ("where the law and the Secretary are silent on a specific question, it is up to the States – sometimes informally advised by the federal Centers for Medicare and Medicaid Services – to make sense of it all in running their programs."). These features of Medicaid are in contrast with other federal statutes that preempt unwanted state or local law in the interests of achieving federal uniformity. *See, e.g., Ray v. Atlantic Ritchfield Co.*, 435 U.S. at 165 ("Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention

to establish a uniform federal regime controlling the design of oil tankers.").

But § 30(A) is different from federal rules establishing uniform, national standards relating to the design of oil tankers or the fat content of avocados. As § 30(A) simply conditions funding on the performance of certain conditions, it cannot preempt a state's Medicaid reimbursement rates. Some types of federal spending legislation, like Title VI of the Civil Rights Act of 1964 and the Religious Land Use and Institutionalized Persons Act, or RLUIPA, impose binding legal obligations on entities that accept federal funds. These statutes require any "program or activity receiving Federal financial assistance" to accommodate religious liberties and refrain from racial discrimination. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); 42 U.S.C. § 2000cc(a)(2)(A) (requiring any "program or activity that receives Federal financial assistance" to accommodate religious liberties). Under these laws, entities must renounce or return federal aid *before* deviating from the specified conditions; otherwise they become federal lawbreakers if they violate the conditions imposed on the receipt of federal funds. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (allowing private individuals to sue for injunctive relief against entities that accept federal money yet fail to comply with Title

IX, which prohibits sex discrimination by universities receiving federal financial assistance).

Other types of federal spending legislation merely offer annual reimbursement to states that comply with certain conditions, or threaten to withhold federal funds from noncompliant states or force the states to return funds once noncompliance is determined. One example is the statute relating to the 21-year-old drinking age. It states that:

> The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

23 U.S.C. § 158(a)(1)(A). Under this type of spending legislation, a state retains the prerogative to lower its drinking age to 18 even after accepting federal highway money. It may lose some future federal money as a consequence of that decision, but it is not breaking any federal law by deviating from criteria for reimbursement and provoking the Secretary of Transportation to reduce the state's allocation of federal funds. No one would contend that a state is violating federal law by returning to an 18-year-old drinking age – even after accepting federal highway funds – and no

one could maintain a "preemption" lawsuit if a state were to do so.

Section 30(A) falls within this latter category of spending legislation. Idaho's reimbursement rates cannot be "preempted" by the Medicaid Act because this statute does not obligate the State to do *anything*. The Medicaid Act permits states to administer their Medicaid programs as they please; it merely requires the Secretary of HHS to reimburse states whose Medicaid programs satisfy the criteria specified in § 1396a and allows the Secretary to cut off funding or repay money if she determines a state plan or a state's administration of it does not meet a condition of funding. A state retains the lawful prerogative to establish and administer a Medicaid program that deviates from § 1396a at any time, and then wait to see if the Secretary will turn off the spigot or merely reduce the amount of federal funding. There is nothing unlawful about state officials taking actions that might goad the Secretary into halting some or all of the state's Medicaid reimbursement payments. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (holding that states may choose to violate conditions in the Affordable Care Act and accept a reduction in federal Medicaid reimbursement). A state that departs from the Medicaid Act's reimbursement criteria does not even violate federal law, let alone deprive any person of federally protected "rights."

All of this is clear from 42 U.S.C. § 1396c, which provides:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds –
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C. § 1396c. The Medicaid Act does nothing more than hold a carrot in front of the states: If a state administers a Medicaid program that satisfies the criteria of § 1396a, then the federal government will reward it by reimbursing some of its Medicaid expenditures. If it does not, it will not. Accordingly, the issue in this case is not whether federal law trumps state law – the Supremacy Clause's concern – the issue is whether the State has satisfied a funding

condition. And that is for the Secretary, not private litigants and federal courts, to decide.

So even if the Ninth Circuit were correct to insist that the Supremacy Clause authorizes private litigants to assert "preemption" claims against state officials in some cases, this is not one of those cases. Idaho is no different from a state that risks losing highway funds if it lowers its drinking age below 21. The Supremacy Clause does not prohibit that decision – and neither does any other provision of federal law. The Ninth Circuit deprives Idaho of making that perfectly lawful choice.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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RICHARD ARMSTRONG, *et al.*,
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v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether Medicaid providers who face injury from state law that conflicts with 42 U.S.C. §1396a(a)(30)(A) may maintain a cause of action for injunctive relief under the Supremacy Clause to prohibit state officials from implementing the preempted state law.

CORPORATE DISCLOSURE STATEMENT

None of the Respondent corporations has a parent corporation, and no public corporation owns any stock in these corporations.

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INTRODUCTION

For two centuries, the federal courts have been open to injured individuals seeking equitable relief against state laws that conflict with federal law and thus are unconstitutional under the Supremacy Clause. These cases have not been limited to anticipatory assertions of defenses to state enforcement actions. Nor has the presence of a Supremacy Clause cause of action depended on the constitutional provision that granted Congress the authority to enact the preemptive federal law. This Court's Supremacy Clause cases are firmly rooted in the traditional equitable authority of the courts that provided the backdrop for the Constitutional Convention, and the availability of equitable relief against preempted state law is necessary to secure the constitutional balance between the federal and state governments.

Congress enacted and amended the Medicaid Act in the context of the availability of a Supremacy Clause cause of action. For roughly half a century, the federal courts have routinely adjudicated countless injunction actions challenging state laws as conflicting with federal statutes enacted under the Spending Clause that provided defunding remedies to federal agencies. Whether brought under 42 U.S.C. §1983 or the Supremacy Clause, these actions have not interfered with, but rather have aided, the federal administration of the Social Security Act programs, including Medicaid, and the language of the Medicaid Act does not demonstrate that Congress intended to foreclose Supremacy Clause actions. Petitioners' plea to eliminate a constitutional cause of action available in the federal courts since the inception of the Republic should be rejected.

STATEMENT OF THE CASE

Respondents Exceptional Child Center, Inc. *et al.* provide "Residential Habilitation," a service available to individuals with a functional mental age of eight years or less, or with severe maladaptive behaviors requiring "consistent, intense, frequent services" to avoid institutionalization. Idaho Admin. Code 16.03.10.584, 16.03.10.702. Idaho funds these services with federal financial support through its Medicaid program, pursuant to a waiver approved by the federal Centers for Medicare and Medicaid Services ("CMS"). 42 U.S.C. §1396n(c); 24 C.F.R. §430.25. The Medicaid Act mandates that Idaho must maintain such methods and procedures relating to payment for these and other medical services "as may be necessary ... to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" to ensure adequate access to care. 42 U.S.C. §1396a(a)(30)(A) ("Section 30(A)").

In 2005, Idaho Code §56-118 was enacted, requiring Idaho's Department of Health and Welfare ("Department") to "implement a methodology for reviewing and determining reimbursement rates" based on federally required and state-specific factors. Cert. Reply App. 12. In 2009, the Department published rates that resulted from this new methodology and "sought CMS approval of an amendment to the ... Waiver to change the method of setting reimbursement rates." *Id.* at 7.[1] Despite CMS'

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[1] The United States as *amicus* claims that through the 2009 waiver amendment, Idaho sought only "eventually" to implement a change in rate-setting methodology. U.S. Br. 5 n.2. But both the language of the waiver amendment (Cert. Reply App. 16), and Idaho's stipulation of facts (*id.* at 7) demonstrate that Idaho sought

approval of that amendment, Idaho did not implement the rates established by the federally approved methodology, solely because the Legislature did not provide sufficient budget appropriations. *Id.* at 8.

No administrative process is available for Medicaid providers or beneficiaries to challenge a State's failure to comply with the provisions of its approved waiver or any other state violation of federal law in implementing a waiver.[2] Lacking an administrative remedy, Respondents filed suit against Petitioners Richard Armstrong *et al.* ("Idaho") alleging that Idaho's continued payment of old rates different from those produced by the federally approved rate-setting methodology conflicted with federal law and should be enjoined.

The District Court held that under Section 30(A), "a state agency must consider actual provider costs" in setting Medicaid reimbursement rates and "budgetary concerns cannot form the sole basis for reimbursement rates," Cert. App. 22, and enjoined the continued use of the then-current rates in place of the rates Idaho admitted were produced by the federally approved methodology.

The Ninth Circuit affirmed, holding that because Section 30(A) requires "that reimbursement rates bear a reasonable relationship to provider costs" and Idaho "concede[s] that the 2006 rates remained in place for

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and obtained approval to "change" or "implement[]" new rate-setting methodologies, not merely to modify them at some later date.

[2] An administrative hearing can be triggered only if CMS *disapproves* a state plan amendment (not a waiver application) or *disallows* particular state spending, and then only if *the State* institutes a challenge. 42 C.F.R. §430.60(a).

'purely budgetary reasons,'" the rates were not consistent with Section 30(A). Cert. App. 3-4. The Ninth Circuit held that Idaho waived any argument that its failure to raise reimbursement rates is not a "Thing" in state law that can be preempted by the Supremacy Clause. *Id.* at 4 n.2.

This Court granted certiorari solely on the question whether Respondents have a right of action under the Supremacy Clause. 135 S.Ct. 44 (Mem) (Oct. 2, 2014). The Court declined to review the second question presented, *viz.*, whether the courts below were correct that Section 30(A) preempts Idaho law. *Id.*; Cert. i. Thus, as the case comes to this Court, it must be assumed that Idaho law conflicts with, and therefore is preempted by, Section 30(A).

SUMMARY OF ARGUMENT

1. Respondents obtained a prospective injunction to enjoin implementation of state law that injured them on the ground that the law is invalid under the Supremacy Clause because it conflicts with 42 U.S.C. §1396a(a)(30)(A). Their suit is structurally indistinguishable from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Foster v. Love*, 522 U.S. 67 (1997), *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) ("*PhRMA*"), and countless cases decided by the federal courts since the founding.

As *amicus* United States recognizes, the availability of federal court suits for injunctive relief against state law preempted by federal law is "well established" and "serves an important purpose in vindicating the supremacy of federal law." U.S. Br. 20 & n.8. This Court recognized the viability of such suits in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738

(1824), reaffirmed their viability in *Shaw*, 463 U.S. at 96 n.14, and has decided on the merits at least 57 such cases, including several in the past few Terms after this Court declined to adopt the position Idaho advances here in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S.Ct. 1204 (2012). *See* Appendix (listing cases). As Justice Kennedy explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting).

These suits fall within a broader category of cases invoking the courts' traditional authority to grant equitable relief – as opposed to damages – to enforce the Constitution. The Supremacy Clause must be read in light of the founding-era understanding that courts with equity jurisdiction could provide individuals equitable relief for injuries caused by public officials acting in excess of their lawful authority.

2. Idaho ultimately concedes that courts may entertain Supremacy Clause preemption actions but proposes that the Court limit their availability to cases where the plaintiff asserts an "anticipatory defense" to a state regulatory action. Pet. Br. 40. But this case fits that model. Moreover, this proposed new limitation on the authority of the federal courts is not supported by precedent or history. *See, e.g., American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S.Ct. 2096, 2103-04 (2013); *PhRMA*, 538 U.S. at 649-50; *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000); *Foster*, 522 U.S. at 68-69. Indeed, the availability of private litigation to vindicate the su-

premacy of federal law is *more* important when no state enforcement action could be brought.

3. Idaho also proposes a new limitation on Supremacy Clause actions in the context of the Medicaid Act. But, while the Court has used a contract analogy as an interpretative aid in some Spending Clause cases, it has always recognized that statutes adopted under Congress' spending powers are "Laws of the United States" for purposes of the Supremacy Clause. U.S. Const., Art. VI, cl. 2. Consequently, the Court repeatedly has struck down state laws preempted by Spending Clause statutes. The Court long ago rejected arguments that the Supremacy Clause is inapplicable when state participation in a Spending Clause program is voluntary and that the presence of a withholding-of-funds remedy as part of Spending Clause programs demonstrates that Congress intended to strip the courts of their traditional jurisdiction to enjoin implementation of preempted state laws. *Rosado v. Wyman*, 397 U.S. 397, 420, 422 (1970). Congress has ratified that interpretation of the pertinent statutes. While Congress could take a variety of actions to limit or channel Supremacy Clause actions, it has not done so in the context of Section 30(A).

4. Precedents regarding whether statutes create individual "rights" enforceable under 42 U.S.C. §1983 are not relevant to suits for prospective injunctive relief under the Supremacy Clause. Those Section 1983 cases deal with an issue of statutory interpretation and a statute that provides for compensatory and punitive damages and permits challenges to state action that does not have the force of law. The Court's precedents make clear that the unavailability of a

claim under Section 1983 does not mean that the federal courts cannot grant injunctive relief to enforce the Constitution.

Likewise, jurisprudence regarding implied statutory rights of action does not govern this case. Those cases are about congressional intent to create a statutory cause of action, which generally would allow damages suits against private defendants for private actions. Such claims are entirely divorced from claims for equitable relief directly under the Supremacy Clause to prevent implementation by public officials of preempted state laws.

"Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). That interest is as present in Supremacy Clause injunction actions like this one as in the actions Idaho would allow.

ARGUMENT

I. AN INJURED PLAINTIFF MAY SEEK INJUNCTIVE RELIEF IN FEDERAL COURT AGAINST STATE LAW PREEMPTED UNDER THE SUPREMACY CLAUSE.

A. The federal courts have always been open to suits by private litigants seeking to enjoin the implementation of unconstitutional state laws, including laws preempted under the Supremacy Clause.

For over two centuries injured individuals have sought equitable relief against preempted state laws in the federal courts. And for roughly half a century the federal courts have routinely adjudicated such ac-

tions in the context of federal statutes enacted under the Spending Clause. This Court should reject Idaho's invitation to radically shrink the traditional equitable powers of the federal courts.

1. Despite its protests, Idaho ultimately concedes that federal courts do have the authority to issue equitable relief directly under the Supremacy Clause. Pet. Br. 40; *see also* U.S. Br. 18; NGA Br. 26; Tex. Br. 15. As the United States recognizes, the availability of suits for injunctive relief against state laws preempted by federal law is "well established," "serves an important purpose in vindicating the supremacy of federal law," and is rooted in the federal courts' traditional equitable powers to grant injunctive relief. U.S. Br. 20 & n.8.

Almost two hundred years ago, this Court held in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that "[i]t was proper" for a federal court to issue an injunction prohibiting implementation of a state law (there a tax) that was "repugnant to a law of the United States, made in pursuance of the constitution" (there the statute creating the Bank of the United States), explaining that the case was properly "cognizable in a Court of equity." *Id.* at 839, 859, 865, 868.[3] This Court reaffirmed the federal courts'

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[3] Congress conferred general federal question jurisdiction on the federal courts in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. Earlier, jurisdiction was generally limited to cases in diversity. *See* Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73. During that time, injunction actions to enforce the Supremacy Clause were available where the federal courts had jurisdiction over the case. *See, e.g.*, *Osborn*, 22 U.S at 817-18 (jurisdiction conferred by statute incorporating Bank of the United States); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 719, 724 (1865) (diversity).

authority to hear such cases in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983), explaining that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, ... presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §1331 to resolve."

Thus, as Justice Kennedy explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting). This Court also pointed out in *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 259 n.6 (1985), that a claim that a state law is preempted by a federal statute adopted under Congress' Spending authority states a federal claim under the same rationale applied in *Shaw*.

The cases listed in the accompanying Appendix reflect that over the past two centuries this Court has decided at least 57 cases brought in federal court directly under the Supremacy Clause for injunctive or declaratory relief against preempted state laws, including several decided in the past few Terms *after* the Court in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S.Ct. 1204 (2012), declined to adopt the position Idaho advances here. *See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2251 (2013) (state law preempted

by National Voter Registration Act);[4] *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S.Ct. 2096, 2103-05 (2013) (local agreements preempted by Federal Aviation Administration Authorization Act ("FAAAA")); *Arizona v. United States*, 132 S.Ct. 2492, 2510 (2012) (state law preempted by federal immigration law); *cf. Sprint Commc'ns, Inc. v. Jacobs*, 134 S.Ct. 584, 588-89 (2013) (unanimously holding *Younger* abstention did not preclude federal preemption action). Countless such cases have been heard by the lower federal courts, and this Court has also decided on the merits numerous Supremacy Clause injunction claims brought initially in the state courts. *See, e.g., Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 442, 445 (2005); *Coyle v. Smith*, 221 U.S. 559, 562-65 (1911); *Boyer v. Boyer*, 113 U.S. 689, 690-91 (1885).[5]

2. These actions fall within a broader category of cases granting equitable relief, which "'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561

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[4] While the Court's approach to analyzing the *merits* of the preemption claim in *Inter Tribal Council* differed from traditional Supremacy Clause cases because the federal statute at issue was adopted under the Elections Clause, the Court did not suggest that the source of Congress' statutory power affected the existence of a cause of action. *See* 133 S.Ct. at 2250

[5] *Cf. Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-77 (2000) ("long tradition of *qui tam* actions," coupled with fact that Court had "routinely entertained" suits by assignees despite never expressly recognizing their standing, was "well nigh conclusive" as to justiciability of *qui tam* claims).

U.S. 477, 491 n.2 (2010) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). *See, e.g., Osborn*, 22 U.S. at 868, 870.

While this Court has been reluctant to recognize new causes of action to seek *damages* for constitutional violations, it has repeatedly reaffirmed the traditional availability of injunctive relief in suits to enforce the Constitution. *See, e.g., United States v. Stanley*, 483 U.S. 669, 683 (1987) (claims for injunctive relief, unlike damages claims, are "designed to halt or prevent the constitutional violation ... [, seek] traditional forms of relief, and '[do] not ask the Court to imply a new cause of action.'") (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 n.2 (1983)); *Malesko*, 534 U.S. at 74; *cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (recognizing "presumed availability of federal equitable relief against threatened invasions of constitutional interests"). The distinction between suits for damages and those seeking equitable relief reflects the historical grounding of the latter in the federal courts' traditional equitable powers. *See Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.").

B. Injunction actions to enforce the Supremacy Clause are supported by the founding era understanding that courts with equitable jurisdiction would have authority to prevent injury caused by constitutional violations.

Injunctions to enforce the Supremacy Clause are

firmly grounded in the founding generation's understanding of equity jurisdiction. Idaho's ahistorical approach ignores the background against which the Supremacy Clause was adopted.[6]

While common law courts in the eighteenth century would hear cases only where the plaintiff's injuries conformed to a recognized form of action, F.W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* 296-300 (1929 ed.), equity courts could hear cases and provide relief for injuries that did not conform to the set common law forms, John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* 7-9 (2d ed. 1787) ("Mitford"). To be entitled to equitable relief, plaintiffs had to show "that the acts complained of are contrary to equity, and tend to the *injury* of the complainants, and that they have no remedy, or not a complete remedy, without the assistance of the court." *Id.* at 43 (emphasis added).

It would be contrary to the understanding at the founding to limit injunctive relief suits to enforce the Constitution to circumstances in which a statute provides the plaintiff a "right" as that term is used in the

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[6] *Amicus* National Governors Association offers an account of colonial-era petitions to the Board of Trade and appeals to the Privy Council in England, but says nothing about types of cases the founding generation would have understood to be cognizable in courts of equity. NGA Br. 4-15. The Association also concedes that colonists could file petitions with the Board of Trade challenging colonial laws as repugnant to English law, and that in drafting the Supremacy Clause, the framers intended that courts would "set aside" preempted state law in actions cognizable in equity. *Id.* at 9, 18-19.

context of modern 42 U.S.C. §1983 and implied-statutory-right-of-action jurisprudence. Indeed, in the founding era a plaintiff in equity did not have to show that a statute provided a "right" even as the term was understood then (*i.e.*, a legal interest recognized by the common law courts). Rather, equity courts had jurisdiction to exercise power in a variety of contexts, including "where the principles of law by which the ordinary courts are guided *give no right*, but upon the principles of universal justice the inference of the judicial power is necessary to prevent a wrong, and the positive law is silent." Mitford at 103-04 (emphasis added); *see* 1 Joseph Story, *Equity Jurisprudence* §§29, 49 (1836) ("Story"). The question was whether the defendant's unlawful acts unjustly "tend to the *injury* of the complainants." Mitford at 43 (emphasis added).

Thus, at the founding, suits in equity against public officials were available to prevent injury caused by actions taken in excess of officials' legally conferred authority. *See, e.g., Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (suit in English High Court of Chancery against turnpike commissioners); *Box v. Allen*, 1 Dickens 49 (Ch. 1727) (commissioners of sewers). Cases decided after the founding confirm the settled principle that "relief may be given in a court of equity ... to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845).

Applying this principle, the founding generation understood that suits would be available in courts with equity jurisdiction to enjoin public officials from transgressing the Constitution's limits on their au-

thority. The Supremacy Clause is one such limit. The framers understood that the courts would have the power to "set aside" and "declare ... void" preempted state laws in order to ensure the supremacy of national law. 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 27 (1911 ed.) (Madison); *id.* at 28 (Morris); *id.* at 391 (Wilson).

The Constitution authorized the creation of federal courts with all traditional equitable powers by declaring in Article III that the judicial power extends "to all cases, in Law and Equity." The first Congress then granted the federal courts diversity jurisdiction over suits "in equity" in the Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 78, and in doing so intended the courts to apply the principles and provide the remedies available in the High Court of Chancery in England. *See Robinson v. Campbell*, 16 U.S. (3 Wheat) 212, 222-23 (1818); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 563 (1851).

Suits to enforce the Constitution through equitable relief proliferated after Congress granted general federal question jurisdiction to the federal courts in all cases "in equity" in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. *See, e.g., Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 14, 16-17 (1881); *Poindexter v. Greenhow*, 114 U.S. 270, 274 (1885); *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311, 313 (1885); *Pennoyer v. McConnaughy*, 140 U.S. 1, 8 (1891); *Ex parte Tyler*, 149 U.S. 164, 187-88 (1893); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 393, 399 (1894); *Scott v. Donald*, 165 U.S. 107, 108-09, 111-12 (1897); *Smyth v. Ames*, 169 U.S. 466, 469-70, 476-77, 517, 522-23 (1898); *see also Philadelphia Co. v. Stimson*, 223 U.S. 605,

620 (1912) (citing numerous cases where "state officers seeking to enforce unconstitutional enactments" were subject to "injunction process" to prevent "injury threatened by [officers'] illegal action"). This Court reaffirmed the viability of such suits in *Ex parte Young*, 209 U.S. 123, 149, 167 (1908).

C. Injunction actions to enforce the Supremacy Clause have correctly been treated the same as suits seeking to enforce other constitutional provisions.

This Court has never distinguished the availability of suits seeking injunctive relief to enforce the Supremacy Clause from suits seeking such relief to enforce other constitutional provisions. Nor is there a reasoned basis for such a distinction.

The Supremacy Clause declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. There is no structural or textual reason to distinguish between the Constitution and laws of the United States for purposes of suits to enjoin implementation of invalid state laws. A state official violates the Constitution by implementing a state statute that conflicts with either source of supreme law.

Contrary to Idaho's contention (Pet. Br. 37-39), a suit to enforce the Supremacy Clause *is* a suit that arises directly under the Constitution. *See Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977) (preemption "claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"). A state law "cannot be constitutional" if "it

conflicts with a law of congress made in pursuance of the constitution, and which makes it the supreme law of the land." *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435, 450 (1842), *overruled on other grounds by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 481-82, 486 (1939); *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("unavoidable consequence of that supremacy which the constitution has declared" is that state laws preempted by "laws enacted by congress" are "unconstitutional and void"); *Osborn*, 22 U.S. at 868, 870 (state law "repugnant to a law of the United States" is "unconstitutional and void").[7]

Idaho suggests the courts' equity jurisdiction is limited to enforcing provisions of the Constitution that involve individual "rights," but this Court has decided on the merits many actions for prospective injunctive relief to enforce *structural* provisions of the Constitution. *See, e.g., Free Enterprise Fund*, 561 U.S. at

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[7] Idaho's reliance on *Swift & Co. v. Wickham*, 382 U.S. 111 (1965) (Pet. Br. 38-39), is misplaced. The Court there dealt with a pure issue of statutory interpretation, *viz.*, whether Congress meant the jurisdiction of three-judge district courts, which was limited to situations where a state statute was challenged "'upon the ground of the unconstitutionality of such statute,'" to cover suits to enjoin enforcement of state laws based on alleged conflict with a federal statute. *Id.* at 114 (quoting 28 U.S.C. §2281 (1958)). The Court recognized that such suits *do* seek relief on "constitutional grounds," because "any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.* at 125. Nonetheless, the Court narrowly construed the jurisdiction of three-judge courts because of the particular concerns of the legislators who enacted the jurisdictional statute and "important considerations of judicial administration." *Id.* at 126-29.

491 n.2 (rejecting argument that "Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim"); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 420-25 (2003) (state law intruded on federal foreign affairs power); *Printz v. United States*, 521 U.S. 898, 905, 918-25 (1997) (federal statute violated no commandeering principle derived from history and "structure of the Constitution"); *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 86-87 (1984) (state requirement violated Dormant Commerce Clause); *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978) (reaching merits of injunctive claim under Compact Clause); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 589 (1952) (steel mill seizures exceeded President's constitutional powers); *Hill v. Wallace*, 259 U.S. 44, 67-68, 70 (1922) (federal statute unenforceable because exceeded Congress' enumerated powers); *cf. Dennis v. Higgins*, 498 U.S. 439, 458 (1991) (Kennedy, J., dissenting) (like Contracts Clause, even if Commerce Clause secures no "rights" in Section 1983 sense, "courts provide a person injured by taxation that exceeds the limits of the Commerce Clause the 'right to have a judicial determination, declaring the nullity of the attempt to' levy a discriminatory tax") (quoting *Carter v. Greenhow*, 114 U.S. 317, 322 (1885)).[8]

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[8] *Amici*'s reliance on dicta in *Thompson v. Thompson*, 484 U.S. 174, 182-83 (1988), about the Full Faith and Credit Clause is misplaced. Tex. Br. 18. The Full Faith and Credit Clause concerns the enforcement of state law through state court judgments in individual disputes. The sole case on which *Thompson* relied, *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 72 (1904), involved a pure *state law* anti-trust action that did not

There is no reason to treat suits for injunctive relief under the Supremacy Clause any differently from these other "structural" cases. As this Court has explained, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury ...." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011).[9] Individual equitable suits to enforce the Supremacy Clause effectuate "[t]he Framers[']conclu[sion] that allocation of powers between the National Government and the States enhances freedom ... [b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.*

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even involve a state court judgment, and the Court held this state law action was not, simply by virtue of the Full Faith and Credit Clause, within the federal question jurisdiction of the federal courts. To hold otherwise would open the federal courts to innumerable quintessentially state law actions. In contrast, Supremacy Clause claims are purely federal, ensure the primacy of federal law in our federal system, and are within the federal courts' jurisdiction. *See Shaw*, 463 U.S. at 96 n.14.

[9] Idaho erroneously relies on *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939) (Pet. Br. 48), in which the Court rejected a challenge to the operation of the Tennessee Valley Authority ("TVA") in a suit by the TVA's competitors. As this Court explained in *Bond*, the plaintiffs in *Tennessee Electric* had no "*state-law* cause of action" and alleged no substantive violation of the Tenth Amendment. *Bond*, 131 S.Ct. at 2363 ("'The sale of government property in competition with others is not a violation of the Tenth Amendment.'") (quoting *Tennessee Elec.*, 306 U.S. at 144) (emphasis added).

II. SUPREMACY CLAUSE ACTIONS ARE NOT LIMITED TO CIRCUMSTANCES INVOLVING THE ASSERTION OF AN "ANTICIPATORY DEFENSE" TO A POTENTIAL STATE ENFORCEMENT ACTION.

Idaho and its *amici* argue that the federal courts' power to issue equitable relief directly under the Supremacy Clause is limited to circumstances when a plaintiff "asserts preemption as an anticipatory defense to state enforcement or regulation of the plaintiff's conduct." Pet. Br. 40; *see* U.S. Br. 18-21; NGA Br. 26-29; Tex. Br. 15. But Idaho's proposed limitation does not help it here, because this action fits within the "anticipatory defense" model. In any event, neither case law nor history supports this suggested limitation, which would undermine the purpose of the Supremacy Clause.

A. This case fits within Idaho's "anticipatory defense" model.

Contrary to Idaho's assumption, the providers' claim here – that Idaho's method for setting reimbursement rates is preempted by federal law – could be raised as a defense to a hypothetical state enforcement action. Under Idaho law, Medicaid providers may not collect more than the reimbursement rate set by the Department of Health and Welfare ("Department"). Idaho Admin. Code 16.03.09.210.04, 16.03.09.230.02.b, 16.03.10.036.02.b. Idaho operates a Medicaid fraud control unit that "collect[s] ... overpayments" above those rates. 42 U.S.C. §1396b(q)(5); *see* Idaho Admin. Code 16.03.09.231.02. To recover overpayments, Idaho may "take enforcement action," Idaho Admin. Code 16.03.10.008, including by recouping

overpayments from other amounts owed to the provider, and where "recoupment is impracticable, the Department may pursue any available legal remedies it may have," *id.* 16.05.07.205. The Department can suspend or terminate providers' participation in Medicaid and impose civil monetary penalties. *Id.* 16.05.07.220, 230, 235. The Department may pursue these remedies through administrative action against the provider, Idaho Code §56-209h(4)-(10), which is subject to judicial review and enforcement, *id.* §67-5270 *et seq.*

A provider's assertion that a determination of overpayment was contrary to federal law – for example, because the State's reimbursement rate was unlawful under the Medicaid Act – is a defense to such an enforcement action. *See, e.g., Kootenai Med. Ctr. v. Idaho Dep't of Health & Welfare*, 147 Idaho 872, 881 (2009) (rejecting on merits argument that state regulation was preempted by federal law in action initiated when State retroactively reviewed and denied Medicaid reimbursements based on that state regulation); Idaho Code §67-5279(2)(a) (permitting reversal of agency action "in violation of constitutional or statutory provisions").

Rather than risking an accusation of misconduct, or facing potential debarment from Medicaid participation, the providers here were entitled to institute this action asserting in equity that the state-imposed maximum payment levels are preempted by federal law, and that they are thus immune from efforts to recoup from them payments they may have received in excess of those levels.

B. This Court has repeatedly resolved preemption actions involving no "anticipatory defense" to state regulation.

1. In any event, contrary to Idaho's assertions (Pet. Br. 41-46), this Court has routinely entertained Supremacy Clause preemption actions when the plaintiffs faced no possible threat of enforcement or regulatory proceedings, including at least three such cases decided in the past two years post-*Douglas*. *See American Trucking Ass'ns*, 133 S.Ct. at 2103-05; *Inter Tribal Council*, 133 S.Ct. at 2251; *Arizona*, 132 S.Ct. at 2510.

Indeed, in *American Trucking Ass'ns*, the Court acknowledged that the criminal provisions that gave the preempted local agreements the force of law did *not* apply to the plaintiffs and relied on two other preemption cases in which the plaintiffs similarly were not the potential target of enforcement action. *See* 133 S.Ct. at 2103-05 (citing *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 371-72 (2008) (FAAAA preempted state requirement applicable to retailers in suit by motor carriers), and *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 248-51 (2004) (Clean Air Act preempted requirements applicable to vehicle fleet operators in suit by engine manufacturers)).[10]

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[10] The defendant port in *American Trucking Ass'ns* could have suspended or revoked the plaintiff trucking companies' permission to operate at the port under a contract, but there is no indication doing so would have involved any state enforcement proceeding in which the plaintiffs could have raised preemption as a defense; the Court could not tell what the port's penalty "scheme entails." 133 S.Ct. at 2100, 2104-05.

There are many other examples of Supremacy Clause actions that do not involve anticipatory defenses to "state compulsion." U.S. Br. 20. As early as 1865, in *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865), the Court decided on the merits a suit to enjoin, as allegedly preempted by federal statute, a state law authorizing construction of a bridge. In *Foster v. Love*, 522 U.S. 67, 68-69, 74 (1997), this Court held a state open primary law that would have permitted election of congressional representatives in October preempted by the federal statute establishing a uniform date for federal elections. And in *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644 (2003) ("*PhRMA*"), seven Justices reached the merits in a Supremacy Clause injunction challenge to a state's Medicaid prescription drug "prior authorization" procedure. *Id.* at 662-68 (plurality); *id.* at 671 (Breyer, J., concurring); *id.* at 687 (O'Connor, J., dissenting).

In *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 532 (1979), the Court observed that "the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public." Nonetheless, the Court entertained (and rejected on the merits) the employer's contention that the payment of benefits to striking employees was preempted by the National Labor Relations Act ("NLRA"). *Id.* at 525, 529, 544-46.

This Court also stated in *Lawrence County* that a preemption challenge to a state law governing local governments' distribution of federal funds was cognizable in federal court. 469 U.S. at 259 n.6; *see infra* at 30. Other cases that do not fit the "anticipa-

tory defense" pattern include *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state law restricting State purchases from companies doing business with Burma preempted because threatens to frustrate federal statutory objectives), *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475-77 (1996) (state law prohibiting use of funds for abortions challenged as preempted by Medicaid Act as affected by Hyde Amendment), *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 649-50 (1995) (insurers challenged state law requiring hospitals to collect surcharges from patients as preempted by Employee Retirement Income Security Act ("ERISA")), *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 283-84 & nn.1-2 (1986) (state statute prohibiting State purchases of products from repeat NLRA violators preempted), *Perez v. Campbell*, 402 U.S. 637, 641-43, 656 (1971) (Bankruptcy Act preempts state law automatically suspending driver's license for failure to satisfy judgment arising out of car accident that has been discharged in bankruptcy), and *Rosado v. Wyman*, 397 U.S. 397, 407, 415-16 (1970) (state law altering method for computing standard of need for welfare recipients inconsistent with Social Security Act).[11]

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[11] The United States asserts that in three cases cited above the plaintiffs "had asserted claims under Section 1983." U.S. Br. at 17 n.6. But the plaintiffs in those cases relied on Section 1983 to pursue claims for violations of *other* constitutional provisions, and the courts expressly or implicitly assumed that Section 1983 did *not* apply to the plaintiffs' preemption claims. *See Rosado v. Wyman*, 304 F. Supp. 1356, 1360-64 (E.D.N.Y. 1969) (concluding court should reach merits of preemption claim

The United States concedes that, at least in *PhRMA*, no state enforcement action was available, but asserts that there the plaintiffs were "in effect asserting an immunity" from what were "in essence regulatory requirements governing primary conduct." U.S. Br. 32 n.12. But this effort to explain away *PhRMA* does not explain many cases cited above, *see, e.g.*, *Gilman*, 70 U.S. (3 Wall.) at 724; *Foster*, 522 U.S. at 68-69, 74; *New York Tel. Co.*, 440 U.S. at 532; *Lawrence County*, 469 U.S. at 259 n.6, and, in any event, the United States offers no historical or legal justification for the distinc-

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because it had "pendent" jurisdiction over that claim, where Section 1983 provided jurisdiction over *separate* Equal Protection claim that had become moot, and expressly declining to decide whether Section 1983 applied to preemption claim), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397, 401 (1970) (concluding district court properly reached merits of preemption claim "[f]or essentially those reasons stated in the opinion of the District Court"); *Love v. Foster*, 90 F.3d 1026, 1032 n.8 (5th Cir. 1996) (expressly deciding preemption claim "under our federal question jurisdiction to resolve a claim under the Supremacy Clause," citing *Shaw*, and declining to decide if plaintiffs *separately* stated claim enforceable under Section 1983), *aff'd*, 522 U.S. 67 (1997); *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998) (*rejecting* preemption claim and *then* permitting amendment of complaint to *add* Section 1983 claim, presumably to support plaintiff's claim that state law violated constitutional exclusive federal authority over foreign affairs), *aff'd*, 181 F.3d 38, 71-77 (concluding state law was preempted, without mentioning Section 1983), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000) (same). The United States does not contest that, in each of these cases, the federal statutes at issue would not have satisfied the current standards for the creation of federal statutory "rights" under *Gonzaga University v. Doe*, 536 U.S. 273 (2002). *See infra* at 47-53.

tion. No language in *PhRMA* or other relevant decisions explains that preemption injunction actions under the Supremacy Clause are available only where the state action at issue "in essence" regulates private conduct. Rather, the decisions focus on the injury to or interference with federal interests that results from operation of the preempted state law.

PhRMA and similar cases are not distinguishable from this case in any relevant respect. At bottom, these cases all involve Supremacy Clause claims to enjoin allegedly preempted state laws affecting access to government benefits, not claims of "immunity" from "state regulation of primary conduct." U.S. Br. 18.

2. Historical practice at the time the Supremacy Clause was adopted also lends no support to Idaho's proposed limitation on preemption actions. While traditional equity suits did include those to enjoin actions at law, they were not limited to such cases. As previously discussed, suits seeking injunctive relief were generally available to prevent unlawful injury where there was no adequate remedy at law, including to redress or prevent injury from statutory violations. *E.g.*, *Bosanquett v. Dashwood*, Forrester, 39-40 (Ch. 1734) (suit in equity for refund based on usury statute where no action at law was available; "tho' a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them"); *see also* 1 John Fonblanque, *A Treatise of Equity*, ch. 1, §3, pp. 13-15 (1793) ("Every matter ... that happens inconsistent with the design of the legislator ... may find relief" in equity); 1 Story § 10 (same). Supremacy Clause ac-

tions do not involve the "creat[ion of] a remedy in violation of law, or even without the authority of law." *Douglas*, 132 S.Ct. at 1213 (Roberts, C.J., dissenting) (internal quotation marks omitted). Rather, these actions "follow[] the law" (*id.*), by ensuring the supremacy of federal law and preventing ongoing Constitutional violations.

Moreover, suits to enjoin injurious actions taken by public officials were traditionally available in equity where the plaintiff was not threatened with any enforcement action at law. *See, e.g.*, *Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (injunction to prevent turnpike commissioners from digging on land); *Gardner v. Trustees of Village of Newburgh*, 2 Johns. Ch. Rep. 162 (N.Y. Ch. 1816) (injunction against village trustees' diversion of stream); *Belknap v. Belknap*, 2 Johns. Ch. Rep. 463 (N.Y. Ch. 1817) (similar); *Bromley v. Smith*, 1 Simons 8 (Ch. 1826) (injunction suit to prevent local treasurers from misapplying funds in manner inconsistent with act of Parliament); *Rankin v. Huskisson*, 4 Simons 13 (Ch. 1830) (injunction prohibiting construction of buildings by Commissioners of Woods and Forests); *Cooper v. Alden*, Harrington's Ch. Rep., 72 (Mich. Ch. 1838) (similar).[12] There is no historical justification for Idaho's proposed limitation.

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[12] Some equity courts also conceived of actions seeking to ensure compliance with statutory requirements governing the use of public funds as in the nature of suits to enforce a trust, a core arena of equity jurisdiction where no legal "rights" were at issue. *See, e.g.*, *Attorney General v. Heelis*, 2 Simons & Stuart 67, 76-78 (Ch. 1824) (commissioners appointed under act of Parliament to provide local public services equivalent to trustees subject to injunction to administer funds as required by statute);

3. Finally, Idaho is also wrong that *Shaw* and other "anticipatory defense" cases involved individual "rights," as that term is used in this Court's Section 1983 and implied-statutory-cause-of-action cases. Pet. Br. 41-45. The statutes in those cases do not contain the "'rights-creating' language" that this Court has deemed "critical" to creation of such a right. *Gonzaga University v. Doe*, 536 U.S. 273, 283-84 & n.3, 287 (2002); *see, e.g.*, *Shaw*, 463 U.S. at 91, 100 (preemption by 29 U.S.C. §1144(a), which states that ERISA "shall supersede any and all State laws insofar as they ... relate to any employee benefit plan").

Other statutes held to preempt state regulation have *no* preemption language at all, much less rights-creating language. *See, e.g.*, *Gould*, 475 U.S. at 283-84, 287-89 (NLRA preempts state statute prohibiting State purchases of products from repeat NLRA violators because it imposes supplemental sanction on conduct regulated exclusively by federal government);[13] *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973) (Federal Aviation Act as amended by

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see generally 1 Story §29 (equitable suits to enforce trusts involved no "rights" recognized by law). Federal grants to States under Spending Clause programs like Medicaid can be understood as similar to trusts, which traditionally could be enforced by beneficiaries in equity even though the trusts provided them no legally cognizable rights.

[13] The Court did hold in *Golden State*, 493 U.S. at 112-13, that a claim of NLRA preemption is cognizable under Section 1983, but *Golden State* was a pre-*Gonzaga* case and, in any event, *Golden State* involved a different species of NLRA preemption than *Gould*. In *Gould*, there was no arguable "right" to be immune from supplemental penalties for violating federal law.

Noise Control Act preempted city ordinance despite absence of express preemption provision); *Hines v. Davidowitz*, 312 U.S. 52, 72-74 (1941) (state law preempted by federal Alien Registration Act). The same is also true of preemption suits involving no federal statute at all. *See, e.g.*, *Garamendi*, 539 U.S. at 416 ("[V]alid executive agreements are fit to preempt state law, just as treaties are ....").[14] Idaho's own acceptance of "anticipatory defense" cases thus conflicts with its insistence that this Court's Section 1983 and implied-statutory-right-of-action jurisprudence precludes the Supremacy Clause action here. Pet. Br. 18-35; *see infra* at 47-56.

C. Recognition of Idaho's proposed new limitation on preemption actions would undermine the purposes of the Supremacy Clause.

The United States recognizes that preemption injunction actions "serve[] an important purpose in vindicating the supremacy of federal law." U.S. Br. 20 n.8. That purpose is implicated here, and would be ill-served by a rule that permitted States to defy federal law in ways that injure private persons while leaving those persons no legal recourse for asserting the supremacy of federal law.

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[14] *Amici*'s arguments notwithstanding (NGA Br. 32; Tex. Br. 12-13), preemption actions do not conflict with *Medellin v. Texas*, 552 U.S. 491 (2008). *Medellin* held that because certain treaties were not self-executing absent implementing federal legislation, a judgment of an international tribunal created by *those* treaties did not "constitute[] directly enforceable federal law that pre-empts state" law. 522 U.S. at 498, 506. State law cannot be enjoined in a Supremacy Clause action where there is no federal law preempting state law.

If anything, the availability of private litigation to vindicate the supremacy of federal law is *more* important when no enforcement action could be brought. That is because a plaintiff who can raise a preemption defense will at some point be able to assert the supremacy of federal law and have the preemption issue adjudicated. A plaintiff who will face no enforcement action, by contrast, will simply lose benefits, be forced to vote in an unlawful election, or otherwise be injured by implementation of a preempted (and therefore void) state law. Foreclosing Supremacy Clause actions where no state enforcement action is possible would allow States to flout federal law by drafting their laws to be effectively self-executing.

III. A CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE IS AVAILABLE TO CHALLENGE STATE AND LOCAL LAWS PREEMPTED BY MEDICAID SECTION 30(A).

A. Supremacy Clause actions are available in cases involving laws enacted under the Spending Clause.

The United States is wrong to suggest that, even if the Supremacy Clause ordinarily supplies a cause of action to challenge preempted state laws, there is no such cause of action when the preemptive federal statute was enacted under the Spending Clause. U.S. Br. 21-23; Cal. Br. 5-8.

1. The text of the Constitution supports no such distinction. The Supremacy Clause applies to all "Laws of the United States," U.S. Const., Art. VI, cl. 2,

including those adopted pursuant to Congress' powers to tax and spend to further the "general Welfare." U.S. Const., Art. I, §8, cl. 1. Ongoing state defiance of any valid federal law undermines the supremacy of federal law. As the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1985) – involving a Spending Clause statute – "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."

2. This Court's precedents do not support disfavored treatment of the Spending Clause. This Court recognized in *Lawrence County*, 469 U.S. at 259 n.6, that a claim that a state law is preempted by a federal Spending Clause statute states a federal claim under the same rationale applied in *Shaw*. There, a preemption action asserted that a state law regulating the distribution of funds that local governments receive from the federal government was preempted by the Payment in Lieu of Taxes Act, 31 U.S.C. §6901 *et seq.*, which granted localities the authority to make their own decisions about such funds. The Eighth Circuit held that the plaintiff did not "affirmatively assert[] a federal claim." *Lawrence County v. South Dakota*, 668 F.2d 27, 30, 32 (8th Cir. 1982). Relying on *Shaw*, this Court recognized that "[t]his ruling was erroneous." *Lawrence County*, 469 U.S. at 259 n.6. The Supremacy Clause claim here is indistinguishable from that in *Lawrence County*.

This Court has also decided on the merits numerous other Supremacy Clause preemption claims in-

volving Spending Clause statutes. *See, e.g., PhRMA*, 538 U.S. at 649-50 (Medicaid Act); *Dalton*, 516 U.S. at 475-78 (Medicaid Act as affected by Hyde Amendment); *Rosado*, 397 U.S. at 407, 420 (Social Security Act).

3. The United States argues that Spending Clause laws are contractual in nature and so the question whether Medicaid providers may enforce particular provisions should be analyzed based on a third-party-beneficiary analogy. U.S. Br. 22-23. But the United States acknowledges that "neither the federal statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract." *Id.* 22. This Court has used the contract analogy only as an interpretive aid, while "be[ing] careful not to imply that all contract-law rules apply to Spending Clause legislation." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (emphasis omitted); *see Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction.").[15]

Further, the analogy to contract law supports the availability of preemption claims based on Spending Clause enactments. Contracting parties operate against a backdrop of default legal rules that govern the interpretation of their agreement. *See, e.g.*, Restatement (Second) of Contracts § 5(2) & cmt. b (1981). Individu-

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[15] Even if the contract analogy were relevant, it would be meaningful only as to actions brought under the quasi-contractual statute itself, not preemption actions brought under the Supremacy Clause, which seek not to "enforce" the statute, but to prevent injury caused by operation of an unconstitutional state law.

als aggrieved by a preempted state law have long been able to seek injunctive relief in federal court, *supra* at 7-10, so a State that accepts and continues to accept funding under a federal statutory program also accepts that a cause of action under the Supremacy Clause will be available to enjoin state violations of the federal law. Such suits have been heard in Spending Clause cases for at least four decades, so the States have had ample notice. *Infra* at 33.[16]

B. The Supremacy Clause applies to the Medicaid Act and to Section 30(A).

1. Idaho argues that Medicaid Section 30(A) lacks preemptive force because it "simply conditions fund-

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[16] States must be deemed to have been aware of this history and the availability of Supremacy Clause actions when they accepted Medicaid funding. Thus, Idaho is wrong to suggest that affirming the availability of Supremacy Clause actions would conflict with *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). Pet. Br. 31-34. In any event, States' lack of awareness of such actions would not render their agreement to comply with the Medicaid Act involuntary. So long as a participating state has "clear notice" of an obligation imposed by federal law, a prospective injunction to preclude implementation of state law that conflicts with the federal statute simply holds the state to the "deal" that it "voluntarily and knowingly" accepts. *Cf. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007) ("Our determination that IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe."); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (Congress need not warn in advance of "remedies available against a noncomplying State"). While Idaho might prefer that enforcement be limited to the ineffectual threat of possible withholding of funds years later by an overburdened federal agency, it does not have a legitimate interest in implementing a preempted law.

ing on the performance of certain conditions" and "does not obligate the State to do *anything*." Pet. Br. 50, 52 (emphasis in original); *see also* Tex. Br. 20-26; Cal. Br. 6-7. To the extent Idaho means to argue that the voluntary nature of state participation in Medicaid affects the relevant analysis, it is mistaken.

This Court long ago rejected the argument that a State's freedom to refrain from Medicaid participation means that the courts cannot enjoin its officials from implementing a state law contrary to the Medicaid Act while the State *does* participate in that program. The Court recognized in *King v. Smith*, 392 U.S. 309 (1968), that "States are not required to participate in the [federal] program," but held that "[t]here is of course no question that the Federal Government ... may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions *is to that extent invalid*." *Id.* at 316, 333 & n.34 (invalidating state regulation inconsistent with Social Security Act) (emphasis added); *see infra* at 34-39. Thus, the United States acknowledges that the Medicaid Act "remains binding law with the full force and preemptive effect of federal legislation under the Supremacy Clause." U.S. Br. 22 n.9 (citing *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curiam); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973)). *See also* Cert. Reply. App. 2-3 (Idaho stipulation that, "[s]hould a state choose to participate in the Medicaid program, it must comply with the requirements of the Medicaid Act.").[17]

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[17] *Amici* suggest that giving States a choice between complying with Section 30(A) and losing federal funding runs afoul

Nor is the Medicaid Act unique in this respect. Congress has created similar voluntary programs under its Commerce Clause authority, where it offers the State the power to regulate industries consistent with federal law or to abandon the field. *See New York v. United States*, 505 U.S. 144, 167 (1992); *FERC v. Mississippi*, 456 U.S. 742, 764-66 (1982); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 288 (1981). This Court has explained that such Commerce Clause statutes are the same as Spending Clause statutes because "the residents of the State retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *New York*, 505 U.S. at 168.

These conditional federal laws are supreme over state law. *See Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 643-48 (2002) (addressing preemption claims under Telecommunications Act of 1996, which permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, 47 U.S.C.

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of *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012) ("*NFIB*"). Tex. Br. 24 n.5. However, *NFIB* held the Medicaid expansion provision of the Affordable Care Act invalid because it conditioned existing Medicaid funding on States' creation of a major new program; the Court explicitly reaffirmed that Congress may impose new requirements as conditions of continued Medicaid funding so long as they do not dramatically deviate from existing law so as to constitute "a shift in kind, not merely degree." 132 S.Ct. at 2605-06. Section 30(A) is not even a new requirement.

§252(e)(5)). Yet if statutory provisions imposing requirements on "voluntary" programs lacked preemptive force, it would follow that these federal laws likewise were not supreme.

2. To the extent that Idaho and its *amici* argue that preemption by the Medicaid Act cannot give rise to a Supremacy Clause action because the substantive obligations are imposed as conditions of federal funding, or because the Act authorizes enforcement by a federal agency through subsequent withholding of Medicaid funds from noncompliant States, they are also mistaken. In *Rosado*, this Court held that the grant of authority to the federal agency to withhold funds did not obviate the duty of courts "to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." 397 U.S. at 422-23. Similarly, *King* concluded there was "no question" that state laws that are "inconsistent with ... federal terms and conditions" imposed upon funds disbursed to States are "invalid." 392 U.S. at 333 n.34.

Those rulings are in accord with many other decisions of this Court, which have held that the Supremacy Clause invalidates state laws that are inconsistent with funding conditions attached to Medicaid and other Social Security Act programs. *See Wos v. E.M.A. ex rel. Johnson*, 133 S.Ct. 1391, 1394-95, 1398, 1402 (2013) (state lien on tort settlements inconsistent with Medicaid Act and therefore invalid under Supremacy Clause); *Arkansas Dep't of Health & Human Servs. v.*

Ahlborn, 547 U.S. 268, 292 (2006) (same); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) ("Because [state] rules conflict with a valid federal regulation [adopted under the Social Security Act], they are *invalid under the Supremacy Clause.*"); *Miller v. Youakim*, 440 U.S. 125, 132, 134, 146 (1979) (state law "is inconsistent with the Social Security Act and *therefore invalid under the Supremacy Clause*"); *Youakim v. Miller*, 425 U.S. 231, 233-37 (1976) (per curiam) (remanding for determination of "Supremacy Clause claim" alleging state regulation was inconsistent with Social Security Act); *Philbrook v. Glodgett*, 421 U.S. 707, 719 (1975) (affirming injunction against state welfare regulation that conflicted with Social Security Act); *Shea v. Vialpando*, 416 U.S. 251, 252-53, 258, 266 (1974) (same); *Carleson v. Remillard*, 406 U.S. 598, 601 (1972) ("If California's definition conflicts with the federal criterion [under the Social Security Act] then *it ... is invalid under the Supremacy Clause.*"); *Philpott*, 409 U.S. at 415-17 (state law preempted by Social Security Act "*by reason of the Supremacy Clause*"); *Townsend v. Swank*, 404 U.S. 282, 285 (1971) ("We hold that the Illinois statute and regulation conflict with [the Social Security Act] and *for that reason are invalid under the Supremacy Clause.*"); *id.* at 286 ("[A] state eligibility standard that excludes persons eligible for assistance ... under federal AFDC standards violates the Social Security Act and *is therefore invalid under the Supremacy Clause.*"); *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 125, 135 (1971) ("[E]nforcement of [the state statute] *must be enjoined* because it is inconsistent with ...

the Social Security Act.") (emphases added in all cases).[18]

Thus, this Court has squarely rejected any notion that by granting defunding authority to a federal agency to enforce statutory requirements imposed as conditions of federal funding, Congress demonstrates an intent to foreclose federal court injunctive actions. *Cf.* Pet. Br. 28-29; U.S. Br. 24-25; *see, e.g.*, *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 522-23 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987); *Cannon v. University of Chicago*, 441 U.S. 677, 704-06 (1979). If Idaho were correct in asserting that a funding withdrawal provision shows that Congress intends to preclude private actions of any kind, that rule would apply both to Supremacy Clause actions and to Section 1983 cases involving provisions of the Social Security Act, and all of those cases would be wrongly decided.[19] As this Court has explained, "[t]he fact that the Federal Gov-

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[18] *Amici* erroneously assert that "this Court has never rejected the argument that the Medicaid Act is incapable of 'preempting' state law," but has merely "*assumed* that the Medicaid Act may preempt state law" because the attorneys in those cases did not argue otherwise. Tex. Br. 25-26 (emphasis in original). This Court has repeatedly "considered and rejected the argument" that a requirement imposed as a condition of federal funding lacks preemptive force to invalidate contrary state laws. *Rosado*, 397 U.S. at 420.

[19] In light of the particular judicial history of the Social Security Act, even if the Court wished to give notice that it would henceforth view the existence of a withholding-of-funds remedy in *new* Spending Clause statutes as indicative of intent to withdraw the traditional authority of the federal courts to entertain Supremacy Clause injunction actions, it would betray

ernment can exercise oversight of a federal spending program and even withhold or withdraw funds ... does not demonstrate that Congress has 'displayed an intent not to provide the "more complete and more immediate relief" that would otherwise be available under *Ex Parte Young*.'" *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1639 n.3 (2011) ("*VOPA*") (quoting *Verizon*, 535 U.S. at 647 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 75 (1996))).

Nor does it matter that the mandates in the Medicaid Act are phrased as requirements for the contents of a state plan that States must submit to a federal agency that has authority to withhold funding. *See infra* at 43; Pet. Br. 51-52; Tex. Br. 20-22. This Court has repeatedly held that similarly structured federal laws establishing requirements for state plans invalidate contrary state laws. *See, e.g.*, *Blum*, 457 U.S. at 139-40 & n.8 (preemption by federal regulation requiring state Emergency Assistance plans to specify reasonable eligibility rules that do not result in inequitable treatment); *Shea*, 416 U.S. at 253, 260, 266 (preemption by federal statute requiring state welfare plans to "take into consideration" work expenses in setting standard of need); *Townsend*, 404 U.S. at 285, 287 (preemption by federal statute requiring state plans to provide for aid to eligible depend-

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Congress' reliance on prior Court decisions to apply such a rule to existing programs. *Cf. Cannon*, 441 U.S. at 717-18 (Rehnquist, J., concurring) (explaining that while Congress was now on notice that Court would be reluctant in future to imply statutory causes of action, Court would not apply that rule retroactively because "[w]e do not write on an entirely clean slate," and Congress had relied on prior interpretations of law).

ent children and defining "eligible child"); *Rosado*, 397 U.S. at 401, 406 n.8, 420 (preemption by federal statute requiring state plans to adjust determination of need and maximum benefits based on changes in living costs);[20] *cf. Java*, 402 U.S. at 125, 135 (preemption by federal statute conditioning payments to States on federal agency certification that state law provides methods of administration "reasonably calculated to insure full payment of unemployment compensation when due").

The highway funding language discussed in *South Dakota v. Dole*, 483 U.S. 203 (1987), does not aid Idaho's position. Pet. Br. 51; Tex. Br. 21 & n.3. The Medicaid Act is written differently from the highway funding statute, which does not mandate that a State accepting highway funds maintain a 21-year-old drinking age. Rather, it directs the federal government to withhold ten percent of specified funds from States that have lower drinking ages. 23 U.S.C. §158(a)(1)(A). The Medicaid Act, by contrast, *requires* participating States to have methods and procedures to ensure that rates provide for efficiency, economy, quality, and access to care; Congress authorized funding withdrawal as a means to enforce this mandate, but expressly chose to impose a mandate rather than to employ the drinking-age model. 42 U.S.C. §§1396a(a)(30)(A), 1396c; *see infra* at 45-46.

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[20] The then-applicable federal law authorized the relevant federal agency to suspend federal funding for noncompliant plans for the violations at issue in these cases. *See* 42 U.S.C. §604(a)(2) (1964 through 1982).

Idaho argues that preemption actions interfere with agency administration of the Medicaid Act (Pet. Br. 29-31; Cal. Br. 10-11), but preemption actions are subject to standard rules of agency deference. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1240 (9th Cir. 2013). The courts can issue injunctive relief to prevent injury caused by state laws in conflict with the Medicaid Act. Where CMS speaks to the issue, however, the courts must defer.[21]

Preemption actions are also necessary in light of CMS' limited resources, which leave only hundreds of federal employees responsible for overseeing 56 different Medicaid programs' compliance with federal law in spending hundreds of billions of dollars in federal funds (and for monitoring provider fraud). *See* 2011 WL 3706105, Brief of Former HHS Officials as *Amici Curiae*, *Douglas v. Independent Living Ctr.*, Case Nos. 09-958, 09-1158, 10-283 (filed Aug. 5, 2011), at *19-22. Without such actions, preempted state law may cause low income Medicaid beneficiaries severe irreparable harm during the extensive time required to complete the administrative proceedings that precede the federal agency's imposition of a penalty. *See id.* at *24-25 & n.11. Moreover, imposition of a defunding penalty would harm the very low income beneficiaries that the Medicaid Act seeks to protect by reducing the funds available to States to reimburse providers for Medicaid services. As such, CMS

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[21] In this case in particular there is no risk of conflicting judicial and agency decisions, because CMS has already approved the rate-setting method that Idaho has failed to implement.

is understandably reluctant, if not completely unwilling, to impose such a penalty. *See id.* at *23-24.

As set forth above, injunction actions involving Spending Clause statutes administered by the Department of Health and Human Services ("HHS") have been the norm for over forty years. And as the former HHS Secretaries' brief sets forth, these actions have *not* caused problems for the federal agency; rather, the experience has been quite the opposite. *See id.* at *28-34.

3. Idaho's argument that Section 30(A) itself uses broad language, and requires consideration of multiple factors (Pet. Br. 30-31, 34-35; U.S. Br. 23), may be relevant to the merits analysis – that is, whether Section 30(A) in fact preempts Idaho's rate-setting method – but not to whether the Supremacy Clause supplies a cause of action. Because this Court denied certiorari on the question whether Respondents had demonstrated a violation of Section 30(A), 135 S.Ct. 44 (Mem) (Oct. 2, 2014), this Court must assume that the lower courts were correct that Idaho law directly conflicts with, and thus is preempted by, the Medicaid Act, and the only question is whether the Supremacy Clause supplies a cause of action to enjoin that preempted state law. *Cf. VOPA*, 131 S.Ct. at 1643 (Kennedy, J., concurring) ("In the posture of the case as it comes before the Court, it must be assumed that VOPA has a federal right to the records it seeks, and so the extension of [*Ex parte*] *Young* would vindicate the Supremacy Clause.").

C. It would violate, not effectuate, Congressional intent to preclude Supremacy Clause actions when Section 30(A) preempts contrary state law.

1. Congress has shown no intent to foreclose Supremacy Clause actions challenging state law as preempted by Section 30(A).

The United States contends that the legislative history shows that allowing a Supremacy Clause cause of action to enjoin state laws preempted by Section 30(A) would violate Congressional intent. U.S. Br. 29-30. But Congress has amended the Medicaid Act repeatedly in the decades since *Rosado*, 397 U.S. 397, held that federal courts have authority to issue injunctive relief against state laws preempted by the Social Security Act's state plan requirements, without changing the statutory structure to make the administrative remedy exclusive or otherwise to indicate its intent to foreclose the role of the courts. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983) (in light of "well-established judicial interpretation" permitting suits under §10(b) of Securities Exchange Act of 1934 "regardless of the availability of express remedies," Congress' decision when amending the securities laws in 1975 "to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action"). Nor has Congress amended the Act or taken any other steps to indicate its intent to preclude the longstanding practice of federal courts entertaining Supremacy Clause preemption actions.

Given Congress' acceptance of Supremacy Clause actions involving Spending Clause statutes over the last

forty-plus years, recognizing the longstanding availability of such actions would not "substantively change the federal rule established by Congress in the Medicaid Act." *Douglas*, 132 S.Ct. at 1212-13 (Roberts, C.J., dissenting). To the contrary, *foreclosing* the traditional authority of the federal courts, which was part of the background against which Congress legislated, would effectuate a substantive change in federal law.

The United States argues that the legislative history of the 1994 "*Suter* fix" amendment shows Congressional intent to foreclose Supremacy Clause actions when the preemptive federal statute is part of the Medicaid Act. U.S. Br. 29-30. The "*Suter* fix" provided that a Medicaid Act provision should not be "deemed unenforceable" on the ground that it requires a state plan or specifies the contents of a state plan, 42 U.S.C. §§1320a-2, 1320a-10, reflecting Congress' express intent to reject Idaho's argument that the Medicaid Act has no preemptive force. *See supra* at 32-33. The *Suter*-related legislative history the United States cites as evidence that Congress intended no preemption actions under the Supremacy Clause simply establishes that Congress intended that the rules about private enforcement that were in place in 1994 would remain undisturbed except for the rule foreclosing enforcement of a provision requiring plans or plan contents. As we have demonstrated, those 1994 rules include those regarding the availability of Supremacy Clause preemption actions. *See supra* at 7-10, 21-27, 29-41. The legislative history does not reveal any intent to foreclose such Supremacy Clause actions.

As further evidence of Congressional intent, the United States points to the repeal of the Boren Amend-

ment in 1997. U.S. Br. 30-31 n.11; Cal. Br. 11-13. But at the time that the Boren Amendment repeal was under consideration, Section 30(A) was already the subject of judicial enforcement by providers. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495-96 (9th Cir. 1997); *Visiting Nurse Ass'n of N. Shore, Inc. v. Bullen*, 93 F.3d 997, 998, 1000 (1st Cir. 1996); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1027, 1028-29 (7th Cir. 1996); *Arkansas Med. Soc'y Inc. v. Reynolds*, 6 F.3d 519, 521-22 (8th Cir. 1993). In light of this case law, the National Governors Association urged Congress to repeal not only the Boren Amendment but also "Boren-like language" in other provisions of the Medicaid Act "that had exposed states to lawsuits driving up rates for services," and specifically cited Section 30(A) as among those provisions (and cited the then-recent Section 30(A) decision in *Orthopaedic Hospital*). *Governors' Perspective on Medicaid:* Hearing Before the S. Comm. on Finance, 105th Cong. 44 (1997). Despite this request, Congress repealed only the Boren Amendment, and not Section 30(A). Nor did Congress adopt any language at that time setting forth an intent that actions against state laws preempted by Section 30(A) be precluded. Given this history, it would ignore rather than further Congressional intent to upend the long line of precedent entertaining Supremacy Clause actions in the context of the Medicaid Act.[22]

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[22] Moreover, whatever the legislative history may say about *provider* suits, the United States points to no evidence of Congressional intent to preclude injunction suits by Medicaid *beneficiaries*. *See, e.g., Pennsylvania Pharm. Ass'n v. Houstoun*, 283 F.3d 531, 538, 541-42, 543-44 (3d Cir. 2002) (en banc) (Alito, J.) (concluding that Section 30(A) is written to benefit Medicaid recipients, not providers).

2. Although Congress has not limited Supremacy Clause actions in the context of Section 30(A), there are ways it could constitutionally do so.

Idaho and its *amici* are wrong to insist that recognizing the long-standing existence of preemption injunction actions would require courts to ignore Congressional intent and entertain private suits in the context of every federal statute, "regardless of what Congress has said." Pet. Br. 13, 23; Tex. Br. 13; NGA Br. 31. While Congress did not limit traditional equitable actions in the context of Section 30(A), *supra* at 31, 34-39, 42-44, there are ways it could do so.

Congress can expressly limit the jurisdiction of the federal courts, so long as an adequate remedy remains. *E.g.*, 29 U.S.C. §101 (limiting jurisdiction to issue injunctions involving labor disputes). Relatedly, it can create alternative "remedial scheme[s]" that, if adequate, foreclose the availability of traditional preemption actions. *Seminole Tribe*, 517 U.S. at 74. But as the United States has previously acknowledged, it is not arguing that Congress in Section 30(A) "'displayed an intent not to provide the "more complete and more immediate relief" that would otherwise be available under *Ex parte Young*.'" 2011 WL 2132705, Brief of U.S. as *Amicus Curiae*, *Douglas v. Independent Living Ctr.*, Case Nos. 09-958, 09-1158, 10-283 (filed May 26, 2011), at *32 n.12 (quoting *Verizon*, 535 U.S. at 647 (quoting *Seminole Tribe*, 517 U.S. at 75)). Providers have no alternative avenue to protect themselves from injury from state law that conflicts with the Medicaid Act.

Congress can also direct the federal courts to apply the doctrine of "primary jurisdiction" and "'refer' a question" to the appropriate federal agency for resolution prior to final judicial adjudication. *PhRMA*, 538 U.S. at 673-74 (Breyer, J., concurring) (noting court can issue injunction pending agency review); *see United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956) ("'Primary jurisdiction' ... applies where a claim is *originally cognizable in the courts*" but adjudication requires "resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.") (emphasis added).[23]

Similarly, Congress can draft federal statutes such that they do not preempt state law at all (*e.g.*, 23 U.S.C. §158(a) (withholding percentage of highway funds to States with lawful drinking age under 21); *see supra* at 39), or such that they preempt state law only after a federal agency takes official action.

Congress also could draft federal law to require a federal agency to enter contracts with States and provide that such contracts would be enforceable only through traditional contract remedies. *Cf.*, *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27, 28 (1977) (concluding state law applied to third-party-beneficiary

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[23] Contrary to *amici*'s argument (Tex. Br. 27-30), primary jurisdiction doctrine does not support reversal here. *See Rosado*, 397 U.S. at 406-07 (holding that primary jurisdiction doctrine does not apply to Social Security Act case where, as here, plaintiff could not initiate administrative process, but noting that federal court should where possible seek views of federal agency). Moreover, Idaho did not raise this argument, here or below.

claim alleging breach of contract between county and federal agency entered pursuant to federal statute). But this Court long ago held that Medicaid is not drafted in a way that forecloses non-contractual remedies. *Supra* at 31-41.

Supremacy Clause actions do not flout Congressional intent; they reinforce it, by ensuring the supremacy of federal law where Congress has not affirmatively limited or redirected this long-standing traditional form of relief.

IV. THE COURT'S JURISPRUDENCE REGARDING 42 U.S.C. §1983 CLAIMS AND STATUTORY RIGHTS OF ACTION DOES NOT APPLY TO INJUNCTIONS SOUGHT DIRECTLY UNDER THE CONSTITUTION.

Notwithstanding Idaho's exhortations (Pet. Br. 19-33), this Court's jurisprudence regarding whether statutes create individual "rights" enforceable under Section 1983 or an implied statutory cause of action is simply not relevant to suits for prospective injunctive relief directly under the Supremacy Clause.

A. Section 1983 claims and preemption injunction actions to enforce the Supremacy Clause are substantively, historically, and practically distinct.

Compared with traditional Supremacy Clause equitable actions, Section 1983 reaches more conduct and provides broader remedies, and when first adopted it greatly expanded the federal courts' jurisdiction. This Court's recognition of limits on that statutory expansion in *Gonzaga* and its progeny, based on the particular statutory text and purpose of Section 1983, does

not affect the pre-existing authority of the federal courts to hear claims for injunctive relief directly under the Supremacy Clause.

This Court has consistently recognized that the unavailability of a claim under Section 1983 does not exclude traditional injunctive relief to enforce the Constitution. *Compare Carter v. Greenhow*, 114 U.S. 317, 322-323 (1885) (holding that Contracts Clause did not "secure" rights enforceable through what is now Section 1983, but noting that Congress "has legislated in aid of the rights secured by that clause of the constitution ... by conferring jurisdiction upon the [lower federal] courts ... of all cases arising under the constitution and laws of the United States"), *with White v. Greenhow*, 114 U.S. 307, 308 (1885) (permitting suit to enforce Contracts Clause to proceed under federal jurisdiction statute); *see also Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) (suit could not be brought under what is now Section 1983, but "[i]f state legislation impairs the obligations of a contract ... remedies are found in [what is now 28 U.S.C. §1331], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States").

That is equally true of suits to enforce the Constitution's Supremacy Clause. *See Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting) (even where Section 1983 damages claims are unavailable, plaintiffs "may vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes").

1. Section 1983 provides a cause of action to challenge state violations of federal rights that could not

be challenged in a traditional suit to enforce the Supremacy Clause.

The Supremacy Clause provides that federal law is supreme over "any Thing in the Constitution or Laws of any State." U.S. Const., Art. VI, cl. 2. It thus preempts – *i.e.*, nullifies or voids – state and local laws and regulations that conflict with or frustrate the objectives of federal law. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress ....'") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)); *McCulloch*, 17 U.S. (4 Wheat.) at 436 (preempted state law is "unconstitutional and void"). A cause of action to enforce the Supremacy Clause is thus only available to challenge state or local statutes, regulations, ordinances, or policies with the force of *law*.[24]

By contrast, Section 1983 authorizes challenges not only to state laws, but also to deprivations of rights,

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[24] As the Ninth Circuit held, and Idaho does not dispute, Idaho waived any argument that its failure to implement lawful reimbursement rates challenged here is not a "Thing" in state law that can be preempted by the Supremacy Clause. Cert. App. 4 n.2. This Court denied certiorari on the second question in Idaho's petition, and thus must assume that Idaho law directly conflicts with the Medicaid Act. *See supra* at 41. Similarly, *amici* argue that this case does not involve traditional "negative" injunctive relief (NGA Br. 29-30), but Idaho has waived any challenge to the form of relief by failing to raise it below or in its opening brief.

privileges, or immunities by individual actions or failures to act by state officials "under color of" law, even when those actions or failures to act *violate* state or local law. *Monroe v. Pape*, 365 U.S. 167, 172 (1961) (Section 1983 provides remedy for rights violations caused "by an official's abuse of his position," even if official violated state law), *overruled on other grounds by Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 663 (1978). Section 1983 thus provides a mechanism for challenging a broad range of state and local executive branch action or inaction that lacks the force of law. *See, e.g., id.* at 169 (warrantless search and arrest); *Wilson v. Garcia*, 471 U.S. 261, 263 (1985) (police beating). The Supremacy Clause does not reach so far – which was among the reasons why Congress felt the need to enact Section 1983. *See Monroe*, 365 U.S. at 172-83 (discussing legislative history).[25]

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[25] Idaho points to *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), as cases in tension with the availability of preemption injunction actions to enforce the Supremacy Clause. Pet. Br. 25; *see also* U.S. Br. 27-28. But those cases involved challenges to state executive branch *actions or failures to act*, not, as here, preemption challenges to the enforcement of state *laws or regulations*. *See Blessing*, 520 U.S. at 337, 345-46 (challenging agency's failure promptly to assign caseworkers); *Suter*, 503 U.S. at 352 (challenging agency's failure to take adequate steps to obtain child support payments). The parties in *Blessing* and *Suter* did not brief the possibility that the challenges could proceed under the Supremacy Clause, and so the Court did not need to reach the question whether, or when, state executive actions may amount to "laws" subject to challenge under the Supremacy Clause. *Cf.* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-69 (2004) (discussing Court's disparate

2. Section 1983 also makes available broader remedies to private litigants. The sole remedies available for equitable claims under the Supremacy Clause are injunctive and declaratory relief. Section 1983, in contrast, provides for damages, including punitive damages (*see Carlson v. Green*, 446 U.S. 14, 22 (1980)), and since 1976, attorneys' fees under 42 U.S.C. §1988(b).

When it was first adopted in 1871, supporters of the provision that became Section 1983 confirmed their intent to provide for monetary relief. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 477 (1871) (Rep. Dawes) (provision would give every citizen "a civil remedy in the United States courts for any damage sustained" in violation of federal rights); *id.* at App. 446 (Rep. Butler) (provision would provide "reparation" and ensure that "full indemnity is made").

Opponents similarly complained that the provision that became Section 1983 created "'a civil action for damages ... in the Federal courts,'" and lamented the "'mercenary considerations'" this expansion of remedies was likely to foster. *Monroe*, 365 U.S. at 178 (quoting Cong. Globe, 42d Cong., 1st Sess. App. 50 (1871) (Rep. Kerr)); *see also* Cong. Globe, 42d Cong., 1st Sess. App. 365 (1871) (Rep. Arthur) (state officials would be subjected to "heavy damages and amercements").[26]

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approaches to challenges to state legislative and executive actions alleged to conflict with federal law). Similarly, despite *amici*'s fears (NGA Br. 32), federal criminal laws cannot "preempt" individual actions by government actors or private parties that do not have the force of law.

[26] *Amici* note that some members of the Congress that enacted the legislation now codified as Section 1983 believed it provided "new" equitable remedies in federal court. NGA

This Court's Section 1983 jurisprudence has largely been an explication of the various contexts in which damages and other enhanced remedies, including attorneys' fees, are available. *See, e.g.*, *Gonzaga*, 536 U.S. at 276 ("The question presented is whether a student may sue a private university for [compensatory and punitive] damages" under Section 1983).

3. When it was first adopted, the statute that is now Section 1983 also greatly expanded the federal courts' jurisdiction, which had previously generally been limited to diversity cases, *supra* at 8 n.3, by providing that suits under its provisions were "to be prosecuted in the several district or circuit courts of the United States." Ku Klux Act of 1871, ch. 22, §1, 17 Stat. 13. Congress did not grant the federal courts general federal question jurisdiction without an amount in controversy until 1980. Federal Question Jurisdictional Amendments Act of 1980, §2, 94 Stat. 2369 (amending 28 U.S.C. §1331). The jurisdictional barrier imposed by the initial lack of general federal question jurisdiction, and the subsequent amount in controversy requirement, was among several reasons litigants have often sought to have their claims fit within the scope of Section 1983, rather than pursuing equitable actions under the Supremacy Clause.

Br. 33 (emphasis omitted). Section 1983 did provide for *some* equitable remedies not previously available in federal court, both by expanding the kinds of state action that could be challenged by private litigants, *supra* at 48-50, and by greatly expanding the federal courts' jurisdiction, *infra* at 52. That Congress also fully understood that preemption injunction actions to enforce the Constitution were previously available where the courts had jurisdiction. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 420 (1871) (Rep. Bright); *Osborn*, 22 U.S. 738.

4. Finally, the limitations this Court has applied to Section 1983 claims stem from the specific statutory language, which applies to deprivations of "*rights, privileges, or immunities* secured by the Constitution and laws" of the United States. 42 U.S.C. §1983 (emphasis added); *see Golden State*, 493 U.S. at 106 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law.").

By contrast, the Supremacy Clause makes no reference to "rights," but focuses on the relationship between federal and state laws, declaring that the "Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2; *see Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) (in contrast to Section 1983, "[p]re-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals").[27]

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[27] Idaho places undue reliance on *Maine v. Thiboutot*, 448 U.S. 1 (1980). Pet. Br. 24-25; *see also* U.S. Br. 25-26. *Thiboutot* stated only that, in previous cases involving the Social Security Act, Section 1983 was "the exclusive *statutory* cause of action because ... the [Social Security Act] affords no private right of action against a State." 448 US. at 6 (emphasis added). The *Thiboutot* parties did not brief the availability of a direct cause of action under the Supremacy Clause for injunctive relief, and the suit in *Thiboutot* involved a claim for attorneys' fees not available under the Supremacy Clause. *Id.* at 9-11. Idaho's reference to dicta in *Horne v. Flores*, 557 U.S. 433 (2009), is similarly misplaced. Pet. Br. 24; Tex. Br. 9-10, 16. In a passing footnote, the Court in *Horne* stated that "neither court below was empowered to decide" whether a state statue violated the No Child Left Behind Act ("NCLB"). 557 U.S. at 456 n.6. But the statement

B. Implied statutory rights of action are distinct from injunction actions to enforce the Supremacy Clause.

This Court's implied-statutory-right-of-action jurisprudence is similarly inapplicable to suits to enforce the Constitution, including injunctive suits to enforce the Supremacy Clause.

Implied statutory rights of action, like Section 1983 claims and unlike Supremacy Clause injunction actions, permit both damages suits and challenges to actions or inactions that lack the force of law. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992) (damages suit alleging sexual harassment; where Court finds implied statutory right of action, it "presume[s] the availability of all appropriate remedies [including damages] unless Congress has expressly indicated otherwise"); *cf. Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57 (1999) (Kennedy, J., dissenting) (expressing special concern when courts "imply a private cause of action for damages" against States) (cited at Pet. Br. 34-35).

Implied statutory actions go even further than Section 1983 claims, permitting suits against private defendants for entirely private action. *Cf. Building. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229 (1993) ("[T]he Supremacy Clause does not re-

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was pure dicta; the case involved relief from a judgment finding a violation of a *different* federal statute. Moreover, in *Horne* the parties *agreed* in their briefs that the NCLB created no private right of action; they did not brief the availability of a Supremacy Clause action to enjoin preempted state law.

quire pre-emption of private conduct."). The Court's implied-statutory-right-of-action jurisprudence has developed primarily in the context of suits against private parties for damages – a broad category of cases all sharing no tie to the Supremacy Clause. *See, e.g.*, *Cort v. Ash*, 422 U.S. 66, 68 (1975) (shareholder derivative suit for damages against corporate directors).[28] This line of authority does not govern this case, which involves traditional equitable relief against government officials directly under the Constitution.[29]

The Court's modern approach to implied statu-

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[28] Idaho erroneously relies on *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342 (2011) (Pet. Br. 26; *see also* U.S. Br. 27), but *Astra* was a damages suit against a private party. *See* 131 S.Ct. at 1347. It did not implicate the Supremacy Clause or the long history of federal suits seeking equitable relief against preempted state laws.

[29] Even in cases involving public defendants, the statutes at issue in this Court's implied statutory right of action holdings applied to private actors as well, so the Court's conclusion also decided whether the statute created an implied right of action against private defendants. For example, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), although the defendant was a state official, the federal regulations at issue were authorized by a federal statute (Title VI) that also covered conduct by private parties. *See also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (environmental statutes that reached private conduct); *California v. Sierra Club*, 451 U.S. 287 (1981) (same). Had the Court concluded that the statutes or regulations in these cases provided for an implied right of action, the holding would have permitted suits against private defendants. In contrast, Supremacy Clause actions by definition are available only to prevent public officials from implementing preempted state laws. *Sandoval*, *Sea Clammers*, and *Sierra Club* also involved challenges to state executive branch actions, not legislatively enacted laws. *See supra* at 49-50 & n.25.

tory rights of action stems from a concern that permitting suits in federal court where Congress has not authorized them "runs contrary to the established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation ... and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008) (internal quotation marks, citations, and brackets omitted). The long-established availability of preemption injunction suits to enforce the Supremacy Clause is fully consistent with these principles. Congress authorized the federal courts to exercise their traditional equitable authority, so long as the dispute otherwise fell within the limits of the court's jurisdiction, and Congress did not remove that authority in Section 30(A).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Examples of Supremacy Clause Cases Decided by This Court

In the 57 cases listed below, this Court decided claims for injunctive or declaratory relief initially brought in federal court against implementation of a state or local law on the ground that the law conflicted with a federal statute or regulation, and thus was preempted under the Supremacy Clause. Based on our review of the courts' published decisions, the preemption claims in these cases were not brought under 42 U.S.C. §1983; nor does it appear that the federal statutes involved contain the type of "rights-creating" language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

There are numerous additional preemption cases decided by this Court that address Supremacy Clause injunction claims initially brought in state court.

1. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (affirming Court of Appeals judgment reversing denial of declaratory and injunctive relief in action by individual residents and nonprofit groups against state statute requiring proof of citizenship when registering to vote, finding preemption by National Voter Registration Act)

2. *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (reversing denial of declaratory and injunctive relief in action by national trade association against local trucking placard and parking requirements, finding preemption by Federal Aviation Administration Authorization Act (FAAAA))

3. *Arizona v. United States*, 132 S. Ct. 2492 (2012) (affirming in part injunctive relief in action brought by United States against state law regulating immigrants, finding preemption by federal immigration law, including Immigration Reform and Control Act (IRCA))

4. *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011) (business and civil rights groups sought declaratory and injunctive relief against state statute regulating employment of non-citizens unauthorized to work, claiming preemption by IRCA)

5. *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60 (2008) (reversing denial of declaratory and injunctive relief in employers' action against state statute prohibiting recipients of certain state grants from using state funds to assist, promote, or deter union organizing, finding preemption by National Labor Relations Act (NLRA))

6. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (affirming declaratory and injunctive relief in action by transportation groups against state statute regulating tobacco shippers and retailers, finding preemption by FAAAA)

7. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (vacating Court of Appeals order affirming summary judgment against claims by diesel engine manufacturers, injured by reduced sales, seeking declaratory and injunctive relief against state regulation of vehicle fleets, finding regulations likely preempted at least in part by Clean Air Act, and remanding for lower courts to determine specifically which regulations were preempted)

8. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003) (pharmaceutical manufacturer association sought injunction against state statute implementing prescription drug rebate program, claiming preemption by Medicaid Act)

9. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (health maintenance organizations sought declaratory and injunctive relief against state statute that impaired insurers' discretion to contract selectively with health care providers, claiming preemption by Employee Retirement Income Security Act of 1974 (ERISA))

10. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (towing company sought declaratory and injunctive relief against municipal ordinance regulating tow trucks, claiming preemption by Interstate Commerce Act)

11. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002) (concluding that doctrine of *Ex parte Young* permits telecommunications company's action for declaratory and injunctive relief against state commission order requiring payments to competitor, claiming preemption by Telecommunications Act of 1996)

12. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (reversing denial of declaratory relief in action by tobacco manufacturers and sellers against state regulations restricting sale and marketing of tobacco products, finding preemption by Federal Cigarette Labeling and Advertising Act)

13. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (affirming summary judgment for as-

sociation of companies engaged in foreign commerce that sought declaratory and injunctive relief against state statute restricting trade with Burma, finding preemption by Foreign Operations, Export Financing, and Related Programs Appropriations Act)

14. *United States v. Locke*, 529 U.S. 89 (2000) (reversing denial of declaratory and injunctive relief in action by trade association of oil tanker operators against state regulations governing tanker operations, finding preemption by Ports and Waterways Safety Act)

15. *Foster v. Love*, 522 U.S. 67 (1997) (affirming Court of Appeals judgment reversing denial of injunction in voters' action for declaratory and injunctive relief against state primary system, finding preemption by federal election statutes)

16. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (trustees of ERISA-regulated health plans sought injunction against state tax on medical centers, claiming preemption by ERISA)

17. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc.*, 519 U.S. 316 (1997) (contractors sought declaratory relief against state statute applicable to public contracts requiring payment of prevailing wages to apprentices in programs without state approval but allowing payment of lower wage in state-approved programs, claiming preemption by ERISA)

18. *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (per curiam) (remanding for entry of narrower injunction, in action by Medicaid providers seeking declaratory and injunctive relief against state constitutional amendment pro-

hibiting use of state funds for abortions, finding preemption by Medicaid Act as affected by Hyde Amendment)

19. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (insurers sought injunction against state statute that imposed surcharges on hospital rates for patients of certain insurance carriers, claiming preemption by ERISA)

20. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (affirming Court of Appeals judgment reversing denial of injunction in employer's action against District of Columbia statute regulating health care coverage, finding preemption by ERISA)

21. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (affirming Court of Appeals judgment reversing denial of declaratory and injunctive relief in action by trade association against state statute regulating employees handling hazardous waste, finding preemption by Occupational Safety and Health Act and related regulations)

22. *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (affirming declaratory and injunctive relief in action by airlines against state guidelines governing airfare advertising, finding preemption by Airline Deregulation Act)

23. *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988) (oil refineries and wholesalers sought declaratory and injunctive relief against Puerto Rico agency orders regulating oil prices, claiming preemption by Emergency Petroleum Allocation Act)

24. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (affirming Court of Appeals judgment reversing denial of declaratory relief in action by natural gas companies against state statute requiring state approval for natural gas companies to issue securities, finding preemption by Natural Gas Act)

25. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (mining corporation sought declaratory and injunctive relief against state permit requirement, claiming preemption by Coastal Zone Management Act, other federal land use statutes, and United States Forest Service regulations)

26. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (employer sought declaratory and injunctive relief against state statute requiring reinstatement of employees after pregnancy leave, claiming preemption by Title VII of the Civil Rights Act of 1964)

27. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (affirming declaratory and injunctive relief obtained by debarred business against state statute penalizing repeat NLRA violators, finding preemption by NLRA)

28. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (operator of plasma centers sought declaratory and injunctive relief against ordinance regulating plasma collection, claiming preemption by Food and Drug Administration regulations)

29. *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985) (approving of federal court preemption action by county seeking declaratory relief,

and holding state statute regulating distribution of funds by units of local government preempted by Payment in Lieu of Taxes Act) (*Lawrence County* involved review of a state court decision, but this Court stated that it was error for the federal courts to have dismissed the county's earlier preemption case filed in federal court, *see* 469 U.S. at 259 n.6)

30. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (reversing Court of Appeals judgment that dissolved injunction and reversed declaratory judgment, in action by cable television operators against state ban on broadcast advertising of alcoholic beverages, finding preemption by Federal Communications Commission regulations)

31. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (affirming in part declaratory and injunctive relief in employers' action against state law prohibiting pregnancy discrimination in employee benefits plans, finding preemption by ERISA)

32. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (utility companies sought declaratory and injunctive relief against state statute that conditioned construction of nuclear power plants on availability of adequate storage and disposal facilities, claiming preemption by Atomic Energy Act and related regulations)

33. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) (corporation sought declaratory and injunctive relief against state securities law, claiming preemption by Williams Act)

34. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519 (1979) (employers sought de-

claratory and injunctive relief against state statute that provided for unemployment benefits to striking workers, claiming preemption by NLRA)

35. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (automobile manufacturer and franchisees sought declaratory and injunctive relief against state statute requiring agency approval to open new retail dealerships, claiming preemption by Sherman Act)

36. *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (employer sought declaratory and injunctive relief against state statute imposing pension funding charge on certain employers, claiming preemption by NLRA)

37. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (affirming in part declaratory and injunctive relief in tanker vessel operators', owners', and customers' action against state statute regulating oil tanker design, finding preemption by Ports and Waterways Safety Act of 1972)

38. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (affirming declaratory and injunctive relief in meat processor's and flower millers' action against state statute and regulation governing labeling of packaged foods, finding preemption by Federal Meat Inspection Act and Fair Packaging and Labeling Act)

39. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (affirming injunctive relief in action by airport operator and airline against municipal noise ordinance banning night flights, finding preemption by Federal Aviation Act)

40. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (ship and oil terminal owners and operators and shipping associations sought declaratory and injunctive relief against state statute governing oil spill liability, claiming preemption by Water Quality Improvement Act and Admiralty Extension Act)

41. *Perez v. Campbell*, 402 U.S. 637 (1971) (reversing denial of declaratory and injunctive relief in action by judgment debtor against state statute automatically suspending driver's license based on nonpayment of judgments, finding preemption by Bankruptcy Act)

42. *Rosado v. Wyman*, 397 U.S. 397 (1970) (reversing Court of Appeals judgment that vacated injunctive relief in action by welfare recipients against amendment to state public benefits law, finding preemption by Social Security Act)

43. *Railroad Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351 (1967) (reversing denial of declaratory and injunctive relief in motor carrier's action against city ordinance requiring license to operate commercial vehicles, finding preemption by Interstate Commerce Act)

44. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (avocado growers sought declaratory and injunctive relief against state statute governing avocado certification, claiming preemption by Agricultural Adjustment Act and related regulations)

45. *Kesler v. Department of Pub. Safety, Fin. Responsibility Div., Utah*, 369 U.S. 153 (1962) (bankrupt sought declaratory and injunctive relief against state statute revoking motor vehicle license and registration, claiming preemption by Bankruptcy Act)

46. *Campbell v. Hussey*, 368 U.S. 297 (1961) (affirming injunction in action by tobacco auction warehouse owners against state statute requiring that certain strains of tobacco be labeled, finding preemption by Tobacco Inspection Act and implementing regulations)

47. *Public Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943) (affirming injunction in action by natural gas company against state commission's orders setting natural gas transport rates, finding preemption by Natural Gas Act of 1938)

48. *Parker v. Brown*, 317 U.S. 341 (1943) (raisin producer sought injunctive relief against state statute requiring diversion of raisins into surplus and stabilization pools, claiming preemption by Sherman Act and Agricultural Marketing Agreement Act of 1937)

49. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (reversing denial of injunction in action by butter company against state statute allowing seizure of food products, finding preemption by federal law governing food inspection, codified in Internal Revenue Code and related regulations)

50. *Hines v. Davidowitz*, 312 U.S. 52 (1941) (affirming injunction in action by non-citizen against state law requiring non-citizens to register and carry identification, finding preemption by Alien Registration Act of 1940)

51. *Mintz v. Baldwin*, 289 U.S. 346 (1933) (cattle company sought injunction against state order that required certification of disease-free cattle, claiming preemption by federal statute governing shipments from quarantined areas)

52. *Clallam County, Wash. v. United States*, 263 U.S. 341 (1923) (answering certified questions to Court of Appeals in action by lumber company and United States seeking decree against state and local tax, finding company to be instrumentality for carrying out war formed under federal Act of July 9, 1918, and thus not subject to state taxation)

53. *Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914) (reversing denial of injunction in action by railroad company against state taxation of mines the railroad operated on land leased from Choctaw and Chickasaw Indians, finding railroad to be federal instrumentality not subject to taxation under Curtis Act of 1898)

54. *Railway Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874) (affirming injunction in action by railroad against county taxation of certain property, finding preemption by federal Act of July 2, 1864)

55. *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873) (railroad incorporated by federal Act of July 1, 1862 sought to enjoin county taxation of certain property, claiming preemption by federal Act of July 2, 1864)

56. *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (coal wharves owner sought injunction against state law authorizing construction of bridge over river, claiming preemption by federal Act of February 18, 1793, which authorized vessels enrolled and licensed according to its provisions to engage in coasting trade)

57. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824) (affirming injunction in action by Bank of

the United States against state tax, finding preemption by federal statute creating the Bank)

RECORD AND BRIEFS

No. 14-15

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. Introduction

Medicaid is "designed to advance cooperative federalism." *Wisconsin Dep't of Health & Family Svcs. v. Blumer*, 534 U.S. 473, 495 (2002), *citing Harris v. McCrae*, 448 U.S. 297, 308 (1980). Within Medicaid's "basic requirements," states are the "first-line administrators" of the program and may "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2632 (2012) (Ginsburg, J., concurring in part), *quoting* Ruger, Of Icebergs and Glaciers, 75 L. & Contemp. Probs. 215, 233 (2012). The Medicaid Act conditions a state's participation in the program – and with that participation, federal funding – on, among other things, a state establishing "methods and procedures" to ensure that provider reimbursement rates are "sufficient" to enlist enough providers to provide access to quality care. 42 U.S.C. § 1396a(a)(30)(A). Idaho's reimbursement rates produced a number of providers that met that standard. At the time this case was filed, the rates had been in place for about three years, and the Centers for Medicare and Medicaid Services had not disturbed Idaho's rates.

The providers do not argue that § 30(A) confers privately enforceable rights. To avoid this obstacle, they propose an expanded theory of preemption that allows a plaintiff with Article III standing to enforce any federal statute against state officials – full stop. The argument goes that they do not need a cause of action or any enforceable rights because this is not a suit to enforce § 30(A) but rather is a suit to enforce the *Constitution* – namely the Supremacy Clause. On this premise Respondents argue that the Supremacy Clause authorizes a claim under the Court's equitable powers to enforce a federal statute against an allegedly conflicting state law.

Respondents' position suffers two primary defects. One, their position is inconsistent with several of this Court's cases, specifically *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). These cases establish that without privately enforceable rights, providers may not enforce § 30(A) against state officials. Respondents' position is also inconsistent with *Maine v. Thiboutot*, 448 U.S. 1 (1980), and the other cases involving provisions of the Social Security Act (of which Medicaid is a part), which hold that § 1983 is the exclusive basis for relief against state officials under the Social Security Act's provisions. Respondents dismiss these cases as irrelevant, but their arguments cannot escape these cases' gravitational pull. The Court has not adopted the distinction Respondents urge here – that by calling a *statutory* enforcement claim a *constitutional* claim a plaintiff

may do under the Supremacy Clause what it cannot do under the statute itself. Respondents advance no legally sufficient reason why the Court should adopt that distinction now.

Two, their position urges an unsupportable theory of the Supremacy Clause and an unjustified use of this Court's equitable powers. That the Supremacy Clause resolves disputes between conflicting state and federal laws says nothing about *who* may present those conflicts. That the Court has decided many preemption cases does not mean that *anyone* can bring those cases anytime any conflict is alleged. Indeed this Court's cases do not support the claim here because the providers are not presenting a defense to or immunity from state regulation that interferes with their property or liberty rights that federal law protects. The very cases Respondents cite in their brief and its appendix demonstrate the limits of preemption they seek to eliminate.

II. Respondents May Not Maintain A Cause Of Action Under the Supremacy Clause To Enforce § 30(A) Against State Officials Because Congress Has Not Created Privately Enforceable Rights Under That Statute

1. Respondents brought this case to force Idaho to reimburse them at specific rates that they claimed were required under § 30(A). While some provisions of the Medicaid Act may establish individual rights enforceable through § 1983 or an implied right of

action, § 30(A) is not one of those provisions. Respondents skip over what § 30(A) actually does. That statute establishes "broad and general" criteria for federal money to assist states in funding their Medicaid programs. *Douglas v. Indep. Living Ctr. of So. Cal.*, 132 S. Ct. 1204 (2012). It prescribes what a state must demonstrate, and what the Secretary of the Department of Health and Human Services must find, in order to authorize that federal funding. It does not, by contrast, entitle respondents to anything. *Cf. Cannon v. Univ. of Chi.*, 441 U.S. 677, 681-82 (1979) (provision of Title IX stating that "No person shall" be discriminated against on the basis of sex by any educational program receiving federal money). The focus of § 30(A) is on "'the aggregate services provided by the State,' rather than 'the needs of any particular person.'" *Gonzaga Univ.*, 536 U.S. at 282, *quoting Blessing v. Freestone*, 520 U.S. 329, 340 (1997). These broad standards do not satisfy the requirement that for spending statutes to be privately enforceable, Congress must "'speak[] with a clear voice,' and manifest[] an 'unambiguous' intent to confer individual rights." *Gonzaga Univ.*, 536 U.S. at 280, *quoting Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 & n.21 (1981). *Gonzaga University* and *Sandoval* establish that without privately enforceable rights, providers may not enforce § 30(A) against state officials.

Respondents do not claim that they have enforceable rights under § 30(A) but they contend that they do not need them in order to enforce that statute

against state officials. They dismiss the Court's § 1983 and implied-right-of-action cases as "simply not relevant" to their claim because they are not enforcing the *statute*, they say, but the *Constitution*. Brief for Respondents 15 ("a suit to enforce the Supremacy Clause *is* a suit that arises directly under the Constitution."), 47. They say that individually enforceable rights are unnecessary when the suit seeks "traditional injunctive relief to enforce the Constitution," including "suits to enforce the Constitution's Supremacy Clause." Brief for Respondents 48. A plaintiff, they argue, may use the Supremacy Clause to enforce funding conditions against states and that the Court has already adopted this approach. *See* Brief for Respondents 32-33, 35-37. There are several defects with the argument and there is no reason for the Court to depart from its decisions in *Gonzaga University* or *Sandoval*, and establish a new category of statutory enforcement cases that allows any party "injured" by state law to "enforce the Supremacy Clause." *See* Brief for Respondents 7, 11.

2. This Court has said that Congressional intent to create privately enforceable rights is "dispositive." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Sandoval*, 532 U.S. at 286 (intent to create remedies is "determinative"). Respondents say that it is not. Were Respondents correct, and this Court's § 1983 cases were not relevant when a plaintiff sought to enforce a statute through the Supremacy Clause when enforcement could not occur under the statute itself, those cases

would be meaningless and their attendant benefits lost. *See Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("Indeed, to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence."). Respondents do not confront their attempted end-run and they have no answer to the structural constitutional concerns their theory presents. The Court's careful approach in examining the enforceability of federal statutes derives from separation-of-powers concerns that prevent the judiciary from treading where Congress has not intended it to go. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990). The Court rejected a nonstatutory alternative enforcement theory for precisely that reason. *Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1348 (2011) (allowing a suit on a third-party beneficiary theory when the statute itself was not enforceable would render "meaningless" the absence of a right of action); *see also* Brief for United States 26 (observing that the Court's cases look to "terms and purposes of the particular statute involved, not to more general and amorphous standards drawn from elsewhere"). This is of course no less important when a statute like § 30(A), with its broad standards administered cooperatively by the expert federal agency and the states that deliver the care, is at issue. *See Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring) (noting benefits of agency, rather than private enforcement when

"statute's key language is broad and nonspecific"). But Respondents do not explain why a statute that is not judicially administrable through § 1983, *see Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), is administrable through the Supremacy Clause.

Contrary to Respondents' contentions, this Court has not adopted the position they take. They contend that the Court has allowed Supremacy Clause causes of action to enforce spending statutes in the absence of enforceable rights, but the cases they cite do not sweep as broadly as they say. As the United States points out, *Rosado v. Wyman*, 397 U.S. 397 (1970), and *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121 (1971) (cited by Respondents, *see* Brief for Respondents 35-36), both involved § 1983 claims. Brief for the United States 17 n.6. So did *King v. Smith*, 392 U.S. 309, 311 (1968); and *Townsend v. Swank*, 404 U.S. 282, 284 n.2 (1971); and *Miller v. Youakim*, 440 U.S. 125, 131 (1979); and *Shea v. Vialpando*, 416 U.S. 251, 257 (1974) (also cited by Respondents, *see* Brief for Respondents 35-36). These cases do not help Respondents because Respondents have no rights enforceable through § 1983, a point they do not contest.

Respondents also present no answer to *Thiboutot*, which observed that § 1983 was "necessarily the exclusive statutory cause of action" to enforce provisions of the Social Security Act, except to relegate it to a footnote and dismiss it as inapplicable. They say *Thiboutot* does not apply because that case

discussed the exclusive *statutory* basis for suits to enforce Social Security Act statutes and said nothing about Supremacy Clause claims. Brief for Respondents 53 n.27. But the United States points out the illogic of this argument: The Respondents' theory permits plaintiffs without enforceable rights to simply allege preemption to force a state's compliance with a statute like § 30(A). Brief for United States 27-28; *see also* Brief for Petitioners 25. Against *Gonzaga* and *Sandoval* and *Thiboutot*, the distinction Respondents advocate cannot stand.

3. Then there is the matter of congressional intent. The best evidence of congressional intent is the statute itself, but even the legislative history Respondents and their *amici* offer does not aid their arguments. Respondents posit that Congress has not intended to preclude private enforcement suits under § 30(A) and that precluding such suits would in fact *violate* congressional intent. Brief for Respondents 42-44. They essentially advocate for a default rule that unless Congress acts to preclude private enforcement of § 30(A), private enforcement is presumptively available. They make two points in support of this argument, neither of which is correct. First, whether under an implied right of action or under § 1983, the inquiries whether a statute is enforceable "overlap in one meaningful respect – in either case [the Court] must determine whether Congress *intended to create a federal right*." *Gonzaga Univ.*, 536 U.S. at 283. There is no justification for a new cause of action under the Supremacy Clause and there is no

justification for a shift in the existing requirements to enforce a federal statute.

Second, they also say that since *Rosado* Congress has shown "acceptance of Supremacy Clause actions involving Spending Clause statues over the last forty-plus years. " Brief for Respondents 42-43. But *Rosado* was a § 1983 case, and Respondents offer no other case demonstrating that Congress has accepted that the Supremacy Clause furnishes a private right of action to enforce § 30(A). Indeed, this Court has not often found Spending Clause legislation to contain enforceable rights. *See Gonzaga Univ.*, 536 U.S. at 280 ("Since *Pennhurst*, only twice have we found spending legislation to give rise to enforceable rights.").

These points aside, two legislative actions related to the Medicaid Act support the notion that Congress does not intend § 30(A) to be privately enforceable. As the United States explains, the now-repealed Boren Amendment held enforceable under § 1983 in *Wilder* required that rates were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. " 42 U.S.C. § 1396a(a)(13)(A) (1988). Brief for United States 30 n.11. The Boren Amendment was repealed in 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). A House committee report produced during the repeal of the Boren Amendment expressed intent that providers ought not be permitted to sue to challenge their reimbursement rates:

> A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations [¶]. It is the Committee's intention that, following enactment of this Act, neither this nor any other provision of Section 1902 [of the Social Security Act, codified as 42 U.S.C. § 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of rates they receive.

H.R. Rep. No. 105-149, at 590-91 (1997).[1]

The other provision the United States points to is the so-called *Suter* fix, which demonstrates that a private right of action would be available to enforce provisions relating to state plans if the case satisfied the § 1983 or implied-right-of-action standards. *See* Brief for United States 29-30. *Amici* Former HHS Officials assert, however, that the legislative history of amendments to the Medicaid Act demonstrates congressional intent that providers would be able to compel state compliance with various provisions.

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[1] *Amici* Former HHS Officials assert that § 30(A) is "structurally similar" to the Boren Amendment and so under *Wilder*'s rationale, § 30(A) "accords rights for providers to vindicate through the Supremacy Clause." Brief for Former HHS Officials 12. The text of the two provisions and the committee report associated with the repeal of the Boren Amendment do not support this position, and anyway, Respondents have never argued that § 30(A) confers enforceable rights.

Brief for Former HHS Officials 9. They quote a 1981 House committee report as saying that "Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action." Brief for Former HHS Officials 10. But the sentence immediately preceding the quoted one refers to "Plan changes *that would affect the rights of Medicaid beneficiaries or participating providers*," H.R. Rep. No. 97-158, 301 (1981) (emphasis added), which indicates that "appropriate remedial action" may have been anticipated where "rights" were at issue. Of course here, privately enforceable rights are not at issue.

4. Finally, Respondents and *amici* Former HHS Officials argue that private enforcement is necessary because HHS does not have the horsepower to enforce Medicaid statutes and the remedy of funding withdrawal is inadequate. Brief for Respondents 40 ("Preemption actions are also necessary in light of CMS's limited resources"; "defunding penalty would harm the very low income beneficiaries that the Medicaid Act seeks to protect"); Brief for Former HHS Officials 14-19. There are two basic problems with these arguments. First, Respondents cite no cases to suggest that a perceived lack of agency resources – a matter for Congress and the President to resolve – determines whether a statute is enforceable. Second, the complaints about the adequacy of the funding-withdrawal remedy are misplaced. The ultimate penalty of funding withdrawal occurs only after negotiation between CMS and the state fails to

produce a mutually acceptable solution. Medicaid is, after all, a cooperative program where states provide care with financial assistance from the federal government. Neither Respondents nor their *amici* have demonstrated that the consequence of funding withdrawal occurs regularly. In reality, most issues are resolved before it ever gets that far.

III. An Equitable Preemption Cause Of Action Under The Supremacy Clause Is Inconsistent With This Court's Preemption Cases

1. The Supremacy Clause does not, by itself, authorize private plaintiffs to enforce federal statutes against state officials. It is not a source of any rights (something Respondents do not seem to dispute). *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979). Rather, the purpose of the Supremacy Clause is "to ensure that, in a conflict with state law, whatever Congress says goes." *Indep. Living Ctr.*, 132 S. Ct. at 1211 (Roberts, C.J., dissenting). And Petitioners do not dispute, as the United States points out, the Court's "longstanding practice of entertaining suits by private parties in federal court to enjoin state regulation of primary conduct as to which the plaintiffs claim immunity under federal law." Brief for United States 18. The question is not whether the Court *may* entertain preemption cases, but *how*. Brief of National Governors Ass'n 25. Just because the Supremacy Clause resolves a dispute between state and federal law does not mean that any

plaintiff may invoke the Court's equitable powers and seek injunctive relief. The simple allegation of a conflict between state and federal law is not enough: Preemption cases "involve[e] 'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Indep. Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting), *quoting Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring). Preemption cases, then, involve anticipatory defenses to state laws that interfered with conduct that was, by virtue of the Supremacy Clause, properly free of state regulation.

The Court explained this operation of the Court's equitable powers in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992). There, plaintiffs challenged Texas' consumer protection statutes prohibiting allegedly deceptive airline fare advertisements as preempted by the Airline Deregulation Act. *Id.* at 383. A threshold question was whether the district court could award injunctive relief. Relying on *Ex parte Young*, 209 U.S. 123 (1908), the Court said it could:

> Like the plaintiff in *Young*, then, respondents were faced with a Hobson's choice: continually violate the Texas law and expose themselves to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review.

Id. at 381.

2. Respondents contend that this is all wrong; their case may proceed as a proper exercise of the federal courts' equitable powers to enforce the Supremacy Clause irrespective of whether there is any federal right at stake or any anticipatory defense to assert. The only requirement a plaintiff alleging preemption must satisfy, they argue, is injury. Brief for Respondents 7, 12-13. The Court, they argue, has "routinely entertained Supremacy Clause preemption cases when the plaintiffs faced no possible threat of enforcement or regulatory proceedings." Brief for Respondents 21. The cases they rely on as evidence of their rule read differently than Respondents suggest. *American Trucking Assn's, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), for example, involved contracts between Los Angeles's Port and trucking companies. Those contracts contained numerous requirements, but were no mere contracts: They "function[ed] as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment." *Id.* at 2103. That the criminal sanctions were aimed at the terminal operators, rather than the trucking companies themselves does not mean the case was not the typical preemption case. The contracts regulated the primary conduct of the trucking companies in a way that was allegedly preempted by federal law and imposed penalties for noncompliance. *Id.* at 2100.

As more evidence of their rule at work, Respondents provide with their brief an appendix listing 57 cases that they say demonstrates the Court has

routinely entertained preemption cases where there was no possibility the plaintiff would have faced state or local regulatory or other enforcement proceedings. These cases do not aid their position either. In fact, they support the view that preemption serves to permit the assertion of an anticipatory defense – something Respondents do not assert in this case.

The appendix purports to list opinions in which this Court "decided claims for injunctive or declaratory relief initially brought in federal court against implementation of a state or local law on the ground that the law was preempted under the Supremacy Clause" and whether the claims "were not brought under 42 U.S.C. § 1983" or "appear" to "contain the type of 'rights-creating' language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002)." Brief for Respondents 1a. The appendix in these Respondents' brief is remarkably similar to the appendix submitted by the *Dominguez* respondents in *Independent Living Center*. *See* Brief for *Dominguez* Respondents in No. 09-1158, 2011 WL 3319552 (Jul. 29, 2011). In *Independent Living Center*, the appendix identified 61 cases; here, it identifies 57 despite the inclusion of three opinions issued in the interim.[2]

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[2] Omitted are *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007) ("We have 'interpret[ed] grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.'"); *Arkansas Department of Health & Human*

(Continued on following page)

The vast majority of the appendix cases represent the anticipatory defense paradigm. *See* Nos. 1, 2, 4-7, 9-12, 14, 16-17, 20-41, 43-51 (44 cases). Interspersed among this cases are decisions involving application of express preemption provisions – particularly section 514 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a) – that arguably reflect Congress's intent to provide an actionable statutory right to be free of conflicting state regulation. *See American Trucking Ass'n* (Federal Aviation Administration Authorization Act ("FAAAA")); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (FAAAA); *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) (ERISA); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997); *California Div. of Labor Standards*

Services v. Ahlborn, 547 U.S. 268 (2006) (suit to enforce 42 U.S.C. § 1396p, which prohibits states from imposing a lien "against the property of any individual prior to his death."); *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 125 (1993) (rights enforceable through § 1983); *Brown v. Hotel & Restaurant Employees & Bartenders Local 54*, 468 U.S. 491, 501 (1984) ("[S]tate law which interferes with the exercise of these federally protected rights . . . is preempted."; *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281 (1977) (federal license "transfer[s] to the licensee 'all the right' which Congress has the power to convey."); *Java*, 402 U.S. 121 (1971); and *Cummings v. City of Chicago*, 188 U.S. 410 (1903) ("The controlling question . . . is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War . . . to proceed with the proposed work. . . "). These omissions may reflect a determination that these cases did involve rights protectable in the federal courts.

Enforcement v. Dillingham Constr., N. Am., Inc., 519 U.S. 316 (1997); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Other cases involve discrete matters committed specifically to federal regulation by constitutional provisions that may provide an independent basis for suit without regard to the Supremacy Clause. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) ("[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent"); *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens").

A set of older cases held private actors to be "federal instrumentalities" immune from state and local taxation, a *sui generis* category of constitutional jurisprudence that did not trigger the need for a Supremacy Clause-based claim for relief. *Clallam County v. United States*, 263 U.S. 341 (1923); *Choctaw, Okla., & Gulf R.R. Co. v. Harrison*, 235 U.S. 292 (1914); *Railway Co. v. McShane*, 89 U.S. (22 Wall.) 444 (1874); *Union Pac. R.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). The federal instrumentality doctrine was premised on the complainant taxpayer's

relationship to the United States by contract or lease and extended to the taxpayer the federal government's immunity from state taxation by virtue of its sovereign status. The federal doctrine had a state instrumentality corollary with respect to federal taxation – a fact underscoring that the federal common law-bestowed immunity, not the Supremacy Clause, provided the "right" being enforced. This Court severely and identically limited both instrumentality doctrines in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938). The decision in *Osborn v. Bank of United States*, 22 (9 Wheat.) 738 (1824), is of a piece. *Id.* at 867 ("[i]f the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money").

To be sure, there are several decisions that are not so neatly characterized. In *Pharmaceutical Research and Manufacturers v. Walsh*, 538 U.S. 644 (2003), this Court entertained a challenge to a preliminary injunction that restrained enforcement of a state statute imposing a prior authorization requirement under the Maine Medicaid program for drugs manufactured by a company that declined to enter into rebate agreement. *Id.* at 653-54. Maine, while challenging before the court of appeals the pharmaceutical association's standing to maintain the action under the federal Medicaid Act (*Pharmaceutical Research and Manufacturers v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003)), did

not raise the question whether a Supremacy Clause-based right of action existed (even if on the merits it failed) before this Court. Justice Thomas alone addressed that issue in his concurring opinion. 538 U.S. at 682-83. So, too, in *Foster v. Love*, 522 U.S. 67 (1997), where the Court invalidated a Louisiana statute deeming as elected any open primary candidate for a federal office who received more than 50 percent of the vote without need to appear on the national election day ballot, the defendant state officer did not dispute the existence of a right of action under the Supremacy Clause – the basis upon which the court of appeals had acted. *Love v. Foster*, 90 F.3d 1025, 1032 n.8 (1996), *aff'd*, 522 U.S. 67 (1997). No more helpful is *Rosado v. Wyman*. There, this Court held that New York violated the Social Security Act by the method used by the State to calculate welfare benefits. *Id.* at 417. Because it agreed with the district court that pendent jurisdiction existed over "this statutory claim," the Court found "no occasion" to determine whether jurisdiction existed under 28 U.S.C. § 1331, given its then $10,000 amount-in-controversy requirement, or 28 U.S.C. § 1343(3). 397 U.S. at 405 n.7; *see Rosado v. Wyman*, 304 F. Supp. 1356, 1362 (E.D.N.Y.) (finding "no doubt" that the "first requirement" of § 1331 jurisdiction was satisfied "since plaintiffs allege that the challenge[d] state statute violates the Social Security Act"), *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970)). The common denominator in these decisions is the absence of any discussion, other than in Justice Thomas's concurrence, of

whether the Supremacy Clause itself provided a substantive cause of action.

Of similar ilk is the *per curiam* opinion in *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996), that reversed, as inconsistent with the 1994 Hyde Amendment (Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1994)), a "blanket invalidation" of an Arkansas statute prohibiting the use of state funds to pay for abortions other than to save the mother's life. This Court did not address the question whether the Supremacy Clause provided an independent basis for the exercise of § 1331 jurisdiction. The Eighth Circuit had concluded that the plaintiffs could "enforce the Medicaid statute, as amended by the Hyde Amendment, through 42 U.S.C. § 1983." *Little Rock Family Planning Servs., P.A. v. Dalton*, 60 F.3d 497, 502 (8th Cir. 1995), *rev'd*, 516 U.S. 474 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 14-15

In the Supreme Court of the United States

RICHARD ARMSTRONG, ET AL., PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Under 42 U.S.C. 1396a(a)(30)(A), a State's plan for medical assistance under the Medicaid Act must "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary * * * to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." The question presented is:

Whether Medicaid providers may maintain a cause of action under the Supremacy Clause to enforce Section 1396a(a)(30)(A) by asserting that it preempts a State's allegedly inconsistent provider-reimbursement rates.

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In the Supreme Court of the United States

No. 14-15

RICHARD ARMSTRONG, ET AL., PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns whether Medicaid providers can bring a federal cause of action directly under the Supremacy Clause to enjoin state Medicaid reimbursement rates as inconsistent with 42 U.S.C. 1396a(a)(30)(A). The United States participated as *amicus curiae* in *Douglas* v. *Independent Living Center of Southern California, Inc.*, Nos. 09-958, 09-1158, and 10-283, in which the same question was presented, but the Court ultimately vacated and remanded on other grounds. 132 S. Ct. 1204 (2012).

STATEMENT

1. a. The Medicaid program, established in 1965 by Title XIX of the Social Security Act (SSA), 42 U.S.C. 1396 *et seq.*, is a cooperative federal-state program to provide medical care to needy individuals.

Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1208 (2012); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Medical providers who furnish services under Medicaid receive payment directly from the States, and the federal government in turn reimburses States for a fixed percentage of the expenses that they incur on behalf of Medicaid-eligible individuals. 42 U.S.C. 1396b. State participation in Medicaid is voluntary, but those States that elect to participate must comply with requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services (HHS) in her administration of the Act. See 42 U.S.C. 1396a; *Douglas*, 132 S. Ct. at 1208; *Wilder*, 496 U.S. at 502. Within those limits, however, each State enjoys great flexibility in designing and administering its own program. *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985).

To qualify for federal funds, participating States must submit to the Secretary, through the Centers for Medicare & Medicaid Services (CMS), a "plan for medical assistance" detailing the nature and scope of the State's Medicaid program and demonstrating its compliance with the Medicaid Act. 42 U.S.C. 1396a(a); 42 C.F.R. 430.10; *Wilder*, 496 U.S. at 502. Among other requirements, a State's plan must

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan * * * as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that

> such care and services are available to the general population in the geographic area.

42 U.S.C. 1396a(a)(30)(A) (Section 30(A)). The Secretary reviews the State's plan, and any subsequent amendment thereto, and determines whether it complies with statutory and regulatory requirements. 42 U.S.C. 1316(a)(1) and (b), 1396a(b); 42 C.F.R. 430.10 *et seq.* If the Secretary disapproves the plan or plan amendment, the State can seek reconsideration and, ultimately, judicial review in the court of appeals. See 42 U.S.C. 1316(a)(2)-(5) and (b); 42 C.F.R. 430.18, 430.38, 430.60 *et seq.* If the State does not act in compliance with an approved plan, the Secretary may initiate a compliance action and withhold federal funds. 42 U.S.C. 1396c; 42 C.F.R. 430.35.

b. Congress has enacted a "waiver" program permitting States to apply to CMS for permission to provide home or community-based services (HCBS) as part of the "medical assistance" furnished under a state plan. 42 U.S.C. 1396n(c); 42 C.F.R. 430.25(c)(2), 440.180-440.181, 441.300 *et seq.* The waiver program authorizes States to provide a range of services "to individuals who would otherwise require institutional care." *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999). Among other things, a State may obtain a waiver to provide residential "habilitation" services to qualifying beneficiaries if the State demonstrates that the cost of caring for those individuals in an HCBS program would not exceed the cost of institutional care. Pet. App. 17; 42 U.S.C. 1396n(c)(4)(B) and (5); 42 C.F.R. 440.180(b)(6). A waiver granted by CMS is provided for a three-year term and may be

renewed for five-year terms. 42 C.F.R. 430.25(h)(2)(i) and (h)(3), 441.304.[1]

As with state plans, a State may amend its waiver program from time to time, subject to federal review and approval. 42 C.F.R. 430.25(f)(1). The State or CMS may terminate a waiver program at any time with 30 days' notice. 42 C.F.R. 441.307. If CMS decides to terminate a waiver, the State may request review of that decision under the same procedures applicable to the disallowance of a state plan or plan amendment. See 42 C.F.R. 441.308.

c. The State of Idaho has a CMS-approved HCBS waiver program to provide residential habilitation services to individuals with developmental disabilities. Pet. App. 17; cf. 42 C.F.R. 430.25(c)(2), 440.150, 441.301. The waiver program includes individually tailored support services, such as skills training, that are "designed to assist eligible participants to reside successfully in the community." Reply Br. App. 3-4.

In 2006, the State modified the reimbursement rates for services provided under its HCBS waiver program. Pet. App. 17. Thereafter, as required by state law, Idaho officials developed a revised payment rate methodology that considered the actual costs incurred by providers. *Id.* at 18; Reply Br. App. 5-6; see Idaho Code Ann. § 56-118(1)-(2) (2006) (requiring a "methodology for reviewing and determining reimbursement rates to private businesses providing * * * residential habilitation agency services" that

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[1] CMS recently issued a final rule amending in certain respects the procedures and requirements for obtaining or renewing an HCBS waiver. 79 Fed. Reg. 2948 (Jan. 16, 2014) (amending 42 C.F.R. 441.301 *et seq.*). Those changes do not bear upon the issues in this case.

"incorporate[s] * * * the actual cost of providing quality services"). In 2009, state officials proposed to the Idaho legislature that the relevant reimbursement rates be increased consistent with that revised methodology. Pet. App. 18; Reply Br. App. 7-8.[2] The Idaho legislature did not appropriate the necessary funds, however, and reimbursement rates remained at 2006 levels. Pet. App. 12, 19; Reply Br. App. 8.

2. a. Respondents (plaintiffs below) are five corporations that provide residential habilitation services to Medicaid beneficiaries in Idaho. Pet. App. 16. Petitioners are two officials responsible for administration of the State's Medicaid program. *Ibid.*

In 2009, respondents filed suit in federal district court in Idaho, claiming that the applicable reimbursement rates for residential habilitation services were too low to satisfy the requirements of Section 30(A) and for that reason were "preempted" by that provision of the Medicaid Act. Respondents sought an injunction ordering the State to implement the revised rates that were proposed, but not adopted, in 2009. Pet. App. 11. The parties stipulated to all relevant facts, see Reply Br. App. 1-10, and filed cross motions for summary judgment. Pet. App. 15, 20.

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[2] In December 2009, the State submitted a waiver amendment advising CMS of the State's intent eventually to implement a revised payment methodology consistent with Idaho Code Ann. § 56-118 (2006). See Reply Br. App. 14-17. That waiver amendment did not, however, alter the payment methodology then in effect and approved by CMS. Thus, contrary to respondents' assertions, see Br. in Opp. 7-8, CMS's approval of the State's December 2009 waiver amendment has no bearing on the posture or outcome of this litigation.

b. The district court granted summary judgment in respondents' favor. Pet. App. 15-24. The court rejected petitioners' suggestion that respondents lacked a valid cause of action, holding, based on Ninth Circuit precedent, that "providers have standing under the Supremacy Clause to challenge a state law reducing reimbursement rates, as preempted by [Section 30(A)]." *Id.* at 23 (citing *Indep. Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008), cert. denied, 557 U.S. 920 (2009)). On the merits, the court acknowledged that the stipulated facts "appear[ed] to support" the State's contention that the reimbursement rates remained "consistent with" the substantive criteria of Section 30(A), including efficiency, economy, quality of care, and beneficiary access to services. *Id.* at 22 (citation and quotation marks omitted). Nonetheless, relying upon *Orthopedic Hospital* v. *Belshe*, 103 F.3d 1491 (9th Cir. 1997), cert. denied, 522 U.S. 1044 (1998), the court held that the State's continued use of the 2006 reimbursement rates was unlawful because the rates did not reflect sufficient consideration of "actual provider costs," Pet. App. 22, and because the legislature's refusal to adopt the higher rates proposed in 2009 was motivated by "budgetary concerns," *id.* at 21-22 (citing *Belshe*, 103 F.3d at 1499 n.3).

The district court denied reconsideration, Pet. App. 7-14, and entered a judgment directing the State to "implement immediately" an increase in the applicable reimbursement rates. *Id.* at 5-6.

c. The court of appeals affirmed by unpublished disposition. Pet. App. 1-4. The court held that respondents "have an implied right of action under the Supremacy Clause to seek injunctive relief against the

enforcement or implementation of state legislation." *Id.* at 2. Acknowledging that four Justices of this Court "would have held otherwise" in *Douglas*, *id.* at 3 (citing 132 S. Ct. at 1212 (Roberts, C.J., dissenting)), the court of appeals nonetheless considered itself bound by circuit precedent and by "prior holdings of the Supreme Court * * * that have recognized a private right of action under the Supremacy Clause." *Ibid.* (citing *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983)). The court expressed some doubt that a State's inaction (*i.e.*, its failure to increase rates) could be "preempted under the Supremacy Clause," *id.* at 4 n.2, but held that petitioners had forfeited any argument in this respect.

On the merits, the court of appeals reaffirmed its understanding that Section 30(A) "require[s] that reimbursement rates bear a reasonable relationship to provider costs." Pet. App. 3 (citing *Belshe*, 103 F.3d at 1499). The court also affirmed the district court's conclusion that the State's reimbursement rates had impermissibly "remained in place for 'purely budgetary reasons.'" *Id.* at 4.[3] It accordingly affirmed the grant of summary judgment to respondents. *Ibid.*

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[3] The panel did not attempt to reconcile this holding with the Ninth Circuit's earlier decision in *Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235 (2013), cert. denied, 134 S. Ct. 900, and 134 S. Ct. 986 (2014), in which the court had deferred to CMS's interpretation that Section 30(A) does not require States to prepare or rely upon provider cost studies in setting provider reimbursement rates. See *id.* at 1245-1250 ("join[ing]" those circuits that "have agreed that § 30(A) does not require any 'particular methodology' for satisfying its substantive requirements" (citation and quotation marks omitted)).

SUMMARY OF ARGUMENT

A. Respondents do not dispute that Medicaid providers possess no statutory private right of action to enforce 42 U.S.C. 1396a(a)(30)(A)—either under 42 U.S.C. 1983 (Section 1983) or directly under the Medicaid Act. Section 30(A) does not confer on providers any individual right; nor does it entitle them to a certain level of payments that would be enforceable under this Court's decision in *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). Instead, Section 30(A) offers only broad criteria to guide HHS's and the States' determinations regarding the adequacy of the methods and procedures set out in a State's Medicaid plan.

B. This Court has never squarely decided if or when a private party has a cause of action to enjoin operation of state laws as preempted by a federal statute that itself contains no private right of action and confers no individual rights enforceable under Section 1983. The Court has, however, decided dozens of preemption claims against state officials on their merits in cases brought in federal court, perhaps implicitly assuming that a federal cause of action exists in some circumstances. Although the Court has not directly explored the nature or source of the cause of action, its cases reflect a longstanding judicial practice: private parties may bring a suit in federal court to enjoin state regulatory action from which the plaintiffs claim immunity under federal law.

C. The present case does not require the Court either to reexamine that practice or otherwise attempt exhaustively to catalog the range of circumstances under which a nonstatutory cause of action may be available to enjoin state officials from violating federal law. Even assuming that a nonstatutory cause of

action is available in other circumstances, recognition of a private right of action under the Supremacy Clause in *this* case would be incompatible with the statute, the methods for its enforcement, and respondents' claim.

First, Section 30(A) is part of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority. In such an arrangement, Medicaid providers are akin to third-party beneficiaries. Under traditional principles, third parties have judicially enforceable contract rights only where, unlike here, the contract was intended to confer on them a legally enforceable right.

Second, the language and structure of Section 30(A) confirm that private enforcement by Medicaid providers would not be appropriate. The statute provides little guidance to courts about how to apply and balance its general, and sometimes competing, policy objectives. It therefore calls for interpretation and evaluation by the responsible agency, rather than private judicial enforcement.

Third, the shared assumption of this Court and Congress with respect to federal-state programs under the SSA has been that private enforcement under a nonstatutory cause of action is not available. If respondents' contrary view were correct, then several prior rulings of this Court regarding the unavailability of an implied right of action and a suit under Section 1983 could easily have been circumvented. Amendments to the SSA, enacted by Congress in 1994, similarly reflect the understanding that the SSA's state plan provisions are not privately enforceable.

Finally, respondents do not assert the type of preemption claim previously entertained by this Court

on the basis of a nonstatutory cause of action: respondents face no affirmative enforcement action by the State in which federal preemption would have been a defense at law, nor do they seek immunity from allegedly preempted state regulation.

ARGUMENT

MEDICAID PROVIDERS CANNOT MAINTAIN A CAUSE OF ACTION UNDER THE SUPREMACY CLAUSE TO ENFORCE SECTION 30(A) AGAINST STATE OFFICIALS

The Department of Health and Human Services is committed to ensuring that state Medicaid programs afford beneficiaries meaningful access to covered care and services. It is essential under Section 30(A) that States carefully consider what impact payment rates may have on the availability of providers sufficient to furnish covered care and services to Medicaid beneficiaries.[4]

The question in this case, however, does not concern the States' substantive obligations under Section 30(A), but instead whether Medicaid providers have a private right of action directly under the Supremacy Clause to sue state officials to enjoin the operation of state laws that are assertedly not in compliance with Section 30(A). As we explain below, given the features of Section 30(A) and the statutory scheme

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[4] In 2011, HHS promulgated a proposed rule to "create a standardized, transparent process for States to follow as part of their broader efforts to" comply with Section 30(A). 76 Fed. Reg. 26,342 (May 6, 2011). Nearly 200 comments were submitted in response to the proposed rule. HHS has informed this Office that it continues to proceed with the rulemaking and currently intends to issue a final rule within the coming year.

in which it appears, no such private right of action is available.

A. No Federal Statute Provides A Cause Of Action To Enforce Section 30(A) Against State Officials

Respondents do not assert any private right of action to enforce Section 30(A) under 42 U.S.C. 1983 or under the Medicaid Act itself. Nor have they disputed that no such statutory cause of action exists under this Court's precedents.

1. To seek redress under Section 1983, "a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997) (emphasis omitted). In *Blessing*, the Court set forth three "factors" for courts to consider in deciding whether a statute confers a right enforceable under Section 1983: (1) whether Congress "intended that the provision in question benefit the plaintiff," (2) whether "the right assertedly protected by the statute is" "so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the provision is "couched in mandatory, rather than precatory, terms." *Id.* at 340-341 (citations omitted). In *Gonzaga University* v. *Doe*, 536 U.S. 273, 283 (2002), the Court clarified that "anything short of an unambiguously conferred right" could not "support a cause of action brought under" Section 1983, and emphasized that only "rights, not the broader or vaguer 'benefits' or 'interests,' * * * may be enforced under the authority of that section." *Ibid.*

After *Gonzaga*, nearly every court of appeals to consider the issue, including the Ninth Circuit, has correctly held that Section 30(A) does not confer on Medicaid providers individual rights enforceable under 42 U.S.C. 1983. See *Equal Access for El Paso*,

Inc. v. *Hawkins*, 509 F.3d 697, 703-704 (5th Cir. 2007), cert. denied, 555 U.S. 811 (2008); *Mandy R.* v. *Owens*, 464 F.3d 1139, 1147-1148 (10th Cir. 2006), cert. denied, 549 U.S. 1305 (2007); *Westside Mothers* v. *Olszewski*, 454 F.3d 532, 542-543 (6th Cir. 2006); *New York Ass'n of Homes & Servs. for the Aging* v. *DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1058-1062 (9th Cir. 2005); *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50, 58-59 (1st Cir. 2004). But see *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 443 F.3d 1005, 1016 (8th Cir. 2006) (declining to reconsider circuit precedent holding that Section 30(A) is enforceable by providers and beneficiaries through Section 1983), cert. granted, judgment vacated in part, 551 U.S. 1142 (2007).

As the courts of appeals have concluded, Section 30(A) does not contain "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 287 (citation omitted). Section 30(A) provides only that "methods and procedures" must be included in state plans "relating to" utilization and payment to assure that payments are "consistent with efficiency, economy, and quality of care" and are "sufficient to enlist enough providers so that care and services are available" at least to the extent that they "are available to the general population in the geographic area." 42 U.S.C. 1396a(a)(30)(A). That provision "has an aggregate focus" and is directed at the "overall methodology" of the state plan. *Sanchez*, 416 F.3d at 1059. It speaks of Medicaid providers not as rights holders, but as being "'enlisted' as subordinate partners in the administration of Medicaid services." *Ibid.* Like the

"substantial compliance" provision at issue in *Blessing*, Section 30(A) is a "yardstick" for designing and evaluating "systemwide performance" based on "the aggregate services provided by the State." 520 U.S. at 343 (emphasis omitted); see *ibid.* (concluding that "the requirement that a State operate its child support program in 'substantial compliance' with Title IV-D [of the SSA] was not intended to benefit individual children and custodial parents"). Section 30(A) thus does not itself unambiguously create an "*individual* entitlement to services." *Ibid.*

Moreover, as this Court and the courts of appeals have repeatedly noted, the language of Section 30(A) is "broad and general" in character. *Douglas* v. *Independent Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1210 (2012); accord *Sanchez*, 416 F.3d at 1060 ("'broad and diffuse'"); *Long Term Care Pharmacy Alliance*, 362 F.3d at 58 (similar). Neither the Medicaid Act nor any regulations promulgated by the Secretary identify a judicially administrable standard by which the statute's broad policy objectives—"efficiency," "economy," "quality of care," and "enlist[ing]" enough providers to make care and services "available * * * at least to the extent that such care and services are available to the general population in the geographic area," 42 U.S.C. 1396a(a)(30)(A)—are to be measured. Cf. *Blessing*, 520 U.S. at 340-341 (stating that enforcement of "vague and amorphous" provision "would strain judicial competence") (citation omitted); Gov't Br. at 15, *Belshe* v. *Orthopaedic Hosp.*, 521 U.S. 1116 (1997) (No. 96-1742) (making similar argument regarding "efficiency, economy, and quality of care"). Nor does Section 30(A) give any guidance as to how a court should balance such general,

and sometimes competing, policy objectives.[5] See *Sanchez*, 416 F.3d at 1059-1060.

Indeed, the assessment of a State's compliance with Section 30(A) necessarily turns on determinations and predictions of legislative fact of the sort appropriate for expert judgment by the State and CMS and for resolution in the course of their ongoing bilateral relationship. Cf. *Douglas*, 132 S. Ct. at 1210. Judicial interpretation and weighing of these objectives in private Section 1983 suits would require courts to make predictive and policy judgments in the first instance, supplant the expert role of CMS, and interfere with the flexibility Section 30(A) affords to the State and CMS in assessing performance and appropriate responses to deficiencies. Cf. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment). Moreover, permitting such suits to proceed under Section 1983 would also "threaten[] to defeat the uniformity that Congress intended by centralizing administration of the federal program in [CMS]." *Douglas*, 132 S. Ct. at 1211.

2. It is also undisputed that the Medicaid Act itself does not afford providers a statutory cause of action to enforce Section 30(A) against noncompliant States. See *Maine* v. *Thiboutot*, 448 U.S. 1, 6 (1980) (stating that the SSA, of which the Medicaid Act is a part, "affords no private right of action against a State").

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[5] The proposed rule issued by the Secretary also does not provide "nationwide standards" or adopt a "singular approach" to compliance. 76 Fed. Reg. at 26,344. Instead, in view of "local variations" and other considerations, the proposed rule creates "Federal guidelines to frame alternative approaches for States to demonstrate consistency with [Section 30(A)'s] access requirements." *Ibid.*

Indeed, a court's "role in discerning whether personal rights exist in the implied right of action context" substantially resembles its inquiry "in discerning whether personal rights exist in the § 1983 context," as "[b]oth inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 285. Thus, "where the text and structure of a statute provide no indication that Congress intends to create new individual rights," as is the case here, "there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286; see *Suter* v. *Artist M.*, 503 U.S. 347, 363-364 (1992) (declining to recognize an implied statutory private right of action for the same reasons that led the Court to conclude that such a suit could not proceed under Section 1983).

B. This Court Has Never Squarely Decided If Or When A Nonstatutory Cause Of Action For Equitable Relief On Preemption Grounds Should Be Recognized Under The Supremacy Clause Or Otherwise, Although It Has Entertained Injunctive Actions Raising Preemption Claims In Certain Circumstances

1. This Court has never squarely decided if or when a federal court should create or recognize a cause of action for equitable relief directly under the Supremacy Clause in the absence of a federal statutory cause of action. To be sure, this Court has suggested that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, * * * presents a federal question which the federal courts have jurisdiction under 28 U.S.C.

§ 1331 to resolve." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983); see *ibid.* ("[F]ederal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."). But *Shaw* addressed only subject-matter jurisdiction, not the existence of a private right of action. Thus, contrary to the court of appeals' understanding, *Shaw* is not a "holding[]" of this Court "recogniz[ing] a private right of action under the Supremacy Clause." Pet. App. 3; see *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case.") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted)); *Burks* v. *Lasker*, 441 U.S. 471, 476 & n.5 (1979) (the question whether a cause of action exists, unlike "a question of jurisdiction," may be assumed without being decided).

The Court has, however, decided the merits of dozens of preemption claims in cases brought against state officials in federal court—without identifying the basis for the underlying cause of action. *E.g.*, *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *Pharmaceutical Research & Mfrs. of America (PhRMA)* v. *Walsh*, 538 U.S. 644 (2003) (plurality opinion). These decisions could be read as implicitly assuming that a nonstatutory federal cause of action exists under some circumstances. But cf. *Steel Co.*, 523 U.S. at 91 ("[D]rive-by

jurisdictional rulings * * * have no precedential effect.").[6]

Some Members of the Court have expressed approval in some contexts of a federal cause of action to prevent enforcement against plaintiffs of an allegedly preempted state law in the absence of a right under Section 1983. See, *e.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (plaintiffs may pursue preemption claim "by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes," because "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983") (citing 28 U.S.C. 1331, 2201, and 2202). Others have reached a contrary conclusion in the specific context of Section 30(A) suits, while acknowledging that the courts may exercise equitable authority in suits like *Ex parte Young*, 209 U.S. 123 (1908). See *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting). But the Court has not, at least in modern times, directly addressed the circumstances in which a nonstatutory

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[6] In a number of this Court's preemption cases in which the cause of action was not discussed, the record discloses that the plaintiffs had asserted claims under Section 1983. See, *e.g.*, *Nat'l Foreign Trade Council* v. *Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998), aff'd 181 F.3d 38 (1st Cir. 1999), aff'd sub nom. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Love* v. *Foster*, 90 F.3d 1026, 1028 (5th Cir. 1996), aff'd, 522 U.S. 67 (1997); J.A. at 4, *Cal. Dep't of Human Res. Dev.* v. *Java*, 402 U.S. 121 (1971) (No. 507); *Rosado* v. *Wyman*, 414 F.2d 170, 177 (2d Cir. 1969), rev'd, 397 U.S. 397 (1970). Others might have satisfied the standards for asserting "rights," "privileges," or "immunities" under Section 1983 even if that provision was not expressly invoked.

private right of action to enjoin state officials from enforcing a state statute, regulation, or policy that allegedly conflicts with, and is thus preempted by, federal law should be fashioned or recognized, or the basis for such a private right of action.

2. Nevertheless, the Court's cases do reflect a longstanding practice of entertaining suits by private parties in federal court to enjoin state regulation of primary conduct as to which the plaintiffs claim immunity under federal law. Cf. *Golden State Transit*, 493 U.S. at 113 (Kennedy, J., dissenting) (The Court has long permitted "a private party [to] assert an immunity from state or local regulation on the ground that the Constitution or a federal statute, or both, allocate the power to enact the regulation to the National Government, to the exclusion of the States.").

The suit in *Ex parte Young*, 209 U.S. 123 (1908), is an early example. Some have described *Ex parte Young* as invoking an accepted principle of equity jurisprudence: that a plaintiff could anticipatorily bring a suit in equity to bar an action at law against which the plaintiff in equity (the defendant in the prospective action at law) would have a valid defense. See *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (*VOPA*) (Kennedy, J., concurring) (describing the suit in *Ex parte Young* as "nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law," and citing John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997-999 (2008)); cf. 4 John Norton Pomeroy, Jr., *Equity Jurisprudence* §§ 1360-1364 (4th ed.

1919); 1 C.L. Bates, *Federal Equity Procedure* § 540 (1901).[7]

Although the question now before the Court is whether respondents have an implied right of action "directly under the Supremacy Clause," Pet. i, this Court's cases suggest that the Supremacy Clause itself may not furnish the only, or even the best, understanding of or basis for the source of a nonstatutory cause of action to enjoin the enforcement of state action that is inconsistent with federal law—as distinguished from supplying the rule of decision on the merits (that federal law preempts conflicting state law) in a case otherwise properly before the court. The Supremacy Clause "is not a source of any federal rights," but rather it "'secures' federal rights by according them priority whenever they come in conflict with state law." *Golden State Transit*, 493 U.S. at 107 (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)) (brackets omitted); see *Douglas*, 132 S. Ct. at 1212 (Roberts, C.J., dissenting); *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991) (con-

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[7] The issue in *Ex parte Young* was not whether a cause of action existed; rather, it was whether a suit for prospective injunctive relief against a state official to enforce federal law would be barred by the State's Eleventh Amendment immunity from suit. The immunity principles established in *Ex parte Young* apply not only where the cause of action is judicially fashioned, as in *Ex parte Young* itself, but also where the cause of action is conferred by a federal statute, such as Section 1983. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *VOPA*, 131 S. Ct. at 1639 (quoting *Verizon Md.*, 535 U.S. at 645) (brackets omitted).

trasting Supremacy Clause with Commerce Clause in this respect); cf. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 116-129 (1965). The Court's practice of entertaining affirmative preemption suits in federal court in certain circumstances may instead be better understood as rooted in the courts' historical exercise of equitable powers—from times predating the development of modern implied-cause-of-action jurisprudence—*e.g.*, to bring a suit in equity to assert preemptively a defense that otherwise would have been available in an action at law. See pp. 18-19, *supra*.[8] But regardless whether the underpinning of the Court's practice is a general equitable cause of action, the Supremacy Clause, or some other source of law, the ability of private parties to obtain protection in the face of state compulsion that violates federal law has considerable historical grounding and appropriately vindicates the supremacy of federal law. Cf. *Douglas*,

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[8] See *Bush* v. *Lucas*, 462 U.S. 367, 373 & n.10 (1983) (discussing "common-law approach to the judicial recognition of new causes of action"); *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001) (discussing development of Court's modern jurisprudence). That practice may have reflected a pre-*Erie* understanding that the "general" law recognized such suits in equity. See *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963) (noting federal courts' creation of common-law rights before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)). Or, perhaps relatedly, it may have reflected an understanding that the conferral of subject-matter jurisdiction on a federal court (including jurisdiction over suits in equity) itself allowed the court to exercise equitable authority in certain familiar circumstances. See *Golden State Transit*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (discussing *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004)). In any event, the practice is now well established and serves an important purpose in vindicating the supremacy of federal law.

132 S. Ct. at 1213 (Roberts, C.J., dissenting) (approving federal courts' "equitable powers to enforce the supremacy of federal law when such action gives effect to the federal rule").

C. The Creation Of A Private Cause Of Action To Enforce Section 30(A) Against State Officials Under The Supremacy Clause Would Not Be Appropriate

To resolve the question presented in this case, the Court need not decide as a general matter if or when a private party can bring a federal nonstatutory cause of action for equitable relief against state officials on preemption grounds—rooted in general equitable jurisprudence, under the Supremacy Clause, or otherwise. Nor need the Court reexamine past cases that reached the merits of preemption claims brought in federal court. We assume for present purposes that a nonstatutory cause of action is properly available to vindicate the supremacy of federal law in certain other circumstances. But there are particular reasons why creation of a private right of action based directly on the Supremacy Clause to enforce the federal statutory provision at issue here would not be compatible with the nature of the statute, the methods for its enforcement, and respondents' claim.

1. First, as a general matter, Section 30(A) is a provision of a cooperative federal-state program enacted pursuant to Congress's Spending Clause authority, and as to which Congress neither provided an express right of action for private parties nor conferred individually enforceable rights. Recognition of a nonstatutory cause of action for Medicaid providers in this setting would be in tension with the nature of the federal-state relationship under Medicaid.

This Court has often said that a law enacted pursuant to the Spending Clause operates "in the nature of a contract" between the federal government and the State. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981); see *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) (plurality) (Roberts, C.J.); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006). Of course, this Court has also recognized that neither the federal statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985).[9] But private parties who receive payment or other assistance through Spending Clause legislation are in a situation similar to that of third-party beneficiaries. Cf. *PhRMA*, 538 U.S. at 683 (Thomas, J., concurring in the judgment). Under traditional contract principles, third parties have judicially enforceable rights only if they are intended, rather than incidental, beneficiaries of the contract, and only if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." Restatement (Second) of Contracts § 302(1) (1981). When the contract is a government contract, "[t]he distinction between an intention to benefit a third party and an intention that the third party

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[9] The Act of Congress establishing the joint federal-state program, for example, remains binding law with the full force and preemptive effect of federal legislation under the Supremacy Clause. *E.g.*, *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam) (SSA preempts state law providing for attachment of federal benefits paid to state prisoners); *Philpott* v. *Essex Cty. Welfare Bd.*, 409 U.S. 413, 417 (1973) (SSA preempts state law requiring reimbursement through payment of federal disability benefits).

should have the right to enforce that intention" is vigorously enforced. 9 John E. Murray, Jr., *Corbin on Contracts* § 45.6, at 92 (rev. ed. 2007); see *German Alliance Ins. Co.* v. *Home Water Supply Co.*, 226 U.S. 220, 230-231 (1912). In light of Congress's decision not to confer individual rights or a statutory right of action in a Spending Clause provision like Section 30(A), see pp. 11-15, *supra*, the analogy to third-party beneficiaries counsels against creating a nonstatutory right of action under the Supremacy Clause to enforce that provision.

2. The text and structure of Section 30(A) also confirm that creating or recognizing a private right of action for Medicaid providers against state officials would not be appropriate. Courts of appeals have found Section 30(A)'s commands to be prohibitively "broad and diffuse" in considering potential Section 1983 enforcement. See *Sanchez*, 416 F.3d at 1060; p. 13, *supra*. Those same terms would be no less difficult to interpret and apply in the context of a private suit for injunctive relief brought under the Supremacy Clause or otherwise. Absent more specific guidance about how to measure a State's compliance with the general standards of economy, efficiency, quality of care, and beneficiary access to services, such determinations are ones properly made by HHS through the exercise of its expert judgment and through the mechanisms of its bilateral relationship with the State. See p. 4 n.1, *supra* (discussing proposed HHS regulations to guide and promote state compliance with Section 30(A)); 42 U.S.C. 1396a(a)(13)(A) (requiring States to have public process for determination of rates for institutionalized care).

As previously discussed (at page 3, *supra*), the Secretary is required to review and approve or disapprove the State's plan and any plan amendments (including HCBS waiver amendments) to ensure compliance with Medicaid Act requirements, including Section 30(A). If the Secretary disapproves a state plan or plan amendment, the State may seek reconsideration. And if the decision is upheld, the State may petition for judicial review in the court of appeals.

Apart from the plan-approval process, if the state plan does not comply with Section 30(A), the Secretary can also undertake a compliance action and withhold federal funds. That administrative process brings to bear "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring in the judgment). And although the agency's action in approving or disapproving a state plan or amendment is subject to judicial review, the agency's interpretation and application of Section 30(A) are reviewed with substantial deference in such proceedings. See *Douglas*, 132 S. Ct. at 1210; *PhRMA*, 538 U.S. at 672-673 (Breyer, J., concurring in part and in the judgment); accord *Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235, 1246-1250 (9th Cir. 2013) (applying *Chevron* deference to interpretation of Section 30(A) reflected in CMS's approval of State plan amendment), cert. denied, 134 S. Ct. 900, and 134 S. Ct. 986 (2014); *PhRMA* v. *Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (same).

By contrast, recognition of a private right of action under the Supremacy Clause would mean that multiple federal courts across different jurisdictions would

similarly (and perhaps simultaneously) be called upon to decide questions of compliance with Section 30(A). Judicial proceedings would move forward on different evidentiary records and would result in different factual findings, which would in turn be reviewable on appeal only under the "clearly erroneous" standard, Fed. R. Civ. P. 52(a)(6). And, as evidenced by the wide array of approaches the courts of appeals have taken in their interpretation of Section 30(A), U.S. Cert. Stage Amicus Br. at 10-11, *Douglas* v. *Indep. Living Ctr.*, *supra* (09-958), the proceedings would risk the development and application of different legal standards. See *Sanchez*, 416 F.3d at 1061 (noting "that exclusive agency enforcement might fit the scheme better than a plethora of private actions threatening disparate outcomes" (quotation marks and citation omitted)).

3. The conclusion that Section 30(A) is not enforceable through a private suit by Medicaid providers is, moreover, consistent with what apparently has been the shared assumption of the Court and Congress that no nonstatutory cause of action is available to challenge actions by state officials on the ground that they are inconsistent with SSA provisions governing state plans under cooperative federal-state programs.

a. In *Thiboutot*, *supra*, this Court first made explicit the conclusion that Section 1983—which renders actionable the "deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*," *ibid.* (emphasis added)—is presumptively available not only to redress violations of the Constitution or of statutes assuring equal protection, but also to redress violations of all federal statutes that confer individual rights, including statutes enacted pursuant to Con-

gress's Spending Clause authority. In addition to the plain language of Section 1983, the Court looked to its prior cases, which it read as resolving "any doubt" about the scope of the statute. *Thiboutot*, 448 U.S. at 4-5. The Court concluded that those cases, including several involving the SSA, had "relied on the availability of a § 1983 cause of action for statutory claims." *Id.* at 5-6. In all of those cases, the Court reasoned, Section 1983 "was necessarily the exclusive statutory cause of action because, as the Court held in [*Edelman* v. *Jordan*, 415 U.S. 651, 673-674 (1974)], the SSA affords no private right of action against a State." *Thiboutot*, 448 U.S. at 6.

If a nonstatutory cause of action fashioned under the Supremacy Clause or on another basis had been available, however, the critical premise underlying the Court's reasoning—that the Court's prior SSA cases had removed "any doubt" as to Section 1983's applicability to statutory claims—would have been unfounded. Each of the prior cases equally could have been explained as arising under a nonstatutory cause of action. See *Thiboutot*, 448 U.S. at 6 (string-citing cases seeking prospective relief from state programs alleged to be "inconsistent" with provisions of the SSA). A holding by this Court that a private cause of action *is* available under the Supremacy Clause to enforce provisions of the SSA would thus be in considerable tension with its ruling in *Thiboutot*.

Such a holding would also displace the Court's implied-right-of-action and Section 1983 jurisprudence, which looks to the terms and purposes of the particular statute involved, not to more general and amorphous standards drawn from elsewhere, such as the Supremacy Clause. This Court has previously ex-

pressed similar concerns in declining to recognize an extra-statutory cause of action. For example, in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342, 1345 (2011), the Court declined to recognize a third-party-beneficiary claim to enforce the terms of a contract between HHS and a drug company where the contractual terms were dictated by a federal-state cooperative program enacted under Congress's Spending Clause authority. There, as here, the parties did not dispute that there was no private right of action under the statutory provision at issue; the statute instead vested enforcement authority in HHS. *Id.* at 1347-1348. As a result, to allow a suit on a third-party-beneficiary rationale would have rendered meaningless the absence of a private right of action under the statute. *Id.* at 1348. Such a suit, the Court explained, "is in essence a suit to enforce the statute itself." *Ibid.* In those circumstances, the Court concluded, it would make "scant sense" to allow that claim to go forward "[n]o matter the clothing in which [the plaintiffs] dress their claims." *Id.* at 1345 (quoting *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005)) (first brackets in original).

Similar considerations are present here. Under the Ninth Circuit's ruling, private parties who lack a statutory cause of action could simply re-style their suit as a preemption action to enjoin state officials from enforcing a state law that was adopted to implement the State's undertakings pursuant to a federal-state program. In *Suter*, for example, the plaintiffs' claim that the State had not made "reasonable efforts" at family reunification in its judicial proceedings, 503 U.S. at 352, could have been re-pleaded as a claim that the State's inadequate efforts were "preempted" by

the reasonable-efforts provision of the Adoption Act. In *Blessing*, the State's alleged failure to abide by Title IV-D's "substantial compliance" requirements, 520 U.S. at 332-333, would have been cognizable had plaintiffs instead challenged the State's program as "preempted" by the substantial-compliance provision. And in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the plaintiffs could have pursued their claim that the State's policy of offering its driving-license examination only in English violated the Department of Justice's disparate-impact regulation, see *id.* at 279, by the simple expedient of filing suit under the Supremacy Clause instead of under Title VI of the Civil Rights Act of 1964.

That respondents here have sought only injunctive relief does not mitigate the inconsistency between private judicial enforcement and the federal-state cooperative scheme that Congress created, where Congress has not conferred individual rights or a private right of action. Significantly, in all of the cases mentioned above, the plaintiffs sought only prospective relief, not damages. *E.g.*, *Suter*, 503 U.S. at 352; *Blessing*, 520 U.S. at 337; *Sandoval*, 532 U.S. at 279; see *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 504 & n.4 (1990). But where Congress *has* conferred legal rights or immunities under such a statute, Section 1983 presumptively supplies an appropriate cause of action for either damages *or* equitable relief, as appropriate.[10] The court of appeals' decision dis-

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[10] Section 1983 does not provide a cause of action for damages against States or state employees in their official capacity. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989). And, unless properly abrogated, sovereign immunity would bar retrospective damages in cases asserting an implied statutory

places this coherent framework under the Medicaid Act.

b. Subsequent federal legislation reinforces the conclusion that no Supremacy Clause or other non-statutory cause of action should be recognized in this context. Two identical provisions of the SSA, added by Congress in 1994, point to the conclusion that the SSA is privately enforceable only when a cause of action lies under Section 1983 or is properly implied directly under the statutory provision at issue. After this Court's decision in *Suter*, which held that the "reasonable efforts" provision of the SSA's Adoption Act was not actionable either directly or under Section 1983, Congress adopted amendments to the SSA that provide:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter* v. *Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

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right of action against state officials acting in their official capacity. See *Quern* v. *Jordan*, 440 U.S. 332, 337-349 (1979); *Edelman*, 415 U.S. at 677.

42 U.S.C. 1320a-2; see 42 U.S.C. 1320a-10 (similar). The Conference Report explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the [SSA] are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter* v. *Artist M.*" H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). The Report also made clear, however, that there was "no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action." *Ibid.*

These amendments indicate that Congress, like the Court in *Suter*, was acting on the understanding that a private right of action should be available to enforce the state plan provisions of federal-state programs under the SSA only when such a cause of action is available under Section 1983 or established implied-private-right-of-action principles. Where a cause of action is not available under either Section 1983 or the particular SSA provision at issue, the amendments appear to contemplate that the provision simply will not be privately enforceable.[11]

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[11] In *Wilder*, this Court addressed the Boren Amendment, a former Medicaid Act provision requiring States to make payments based on rates that were "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" that provide inpatient hospital, skilled nursing, and other institutional services. 42 U.S.C. 1396a(a)(13)(A) (1988). *Wilder* held that this provision created a right enforceable by Medicaid providers under Section 1983. 496 U.S. at 524. There was widespread criticism of that ruling. See *Governors' Proposal on Welfare and Medicaid: Hearings Before the Senate Comm. on Finance*, 104th Cong., 2d Sess. 88 (1996) (statement of Hon. Donna

4. Finally, respondents here face no affirmative enforcement action by the State, in which federal preemption would be a defense at law. Cf. *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting); *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring). Nor do respondents seek immunity from allegedly preempted state regulation that the State seeks to impose on their primary conduct. The allegedly preempted reimbursement rates—or, more precisely, the State's allegedly preempted "failure to amend existing reimbursement rates," Pet. App. 21; see *id.* at 4 n.2—do not regulate respondents' primary conduct. Rather, the rates merely offer providers less money for certain services than what they believe should be paid under the cooperative federal-state Medicaid program. Section 30(A), however, is intended to serve broad and general programmatic interests of the federal government and the State, not to confer reimbursement rights on providers. The reimbursement relationship between a State and a provider is essentially contractual in nature. It would be anomalous for one party to a prospective or existing contract (a provider) to have a legal *right*—a cause of action—to insist that the other party (the State) increase its offer for a future contract or to increase its payments under an existing contract.

E. Shalala) ("We favor the repeal of the Boren Amendment. It has been the provider suits that have driven [States] crazy."). Congress repealed the Boren Amendment and replaced it with a more limited requirement that States provide for public participation in their ratemaking processes for such institutional services. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 507-508 (42 U.S.C. 1396a(a)(13)(A) (cited at p. 23, *supra*)).

By contrast, almost all of the cases relied upon by respondents (see Br. in Opp. 11) and the court of appeals (see *Indep. Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050, 1053-1055 (9th Cir. 2008)) involved claims for relief from state-law requirements or other burdens that were allegedly inconsistent with federal law.[12] In *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), for example, an airport owner sought to enjoin an ordinance imposing a curfew on jet aircraft, alleging that the ordinance was preempted by the Federal Aviation Act. *Id.* at 625-626. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), tanker vessel operators urged that state regulation of tanker operation and design was preempted by the federal Ports and Waterways Safety Act. *Id.* at 154-155. And in *Gade* v. *National Solid Wastes Management Association*, 505 U.S. 88 (1992), a trade association of regulated waste-removal businesses sought to enjoin enforcement of a state licensing requirement as

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[12] Since *Gonzaga*, this Court has decided only one case, *PhRMA*, in which a private party sued in federal court to enjoin state officials from enforcing an allegedly preempted state law in circumstances even arguably similar to those here. The basis for the plaintiff's cause of action was not addressed by the Court, cf. 538 U.S. at 683 (Thomas, J., concurring in the judgment), but the case differed in important respects from this one. There, the question was not whether the State had complied with obligations imposed as a condition of receiving federal Medicaid funds, but rather, whether the State's invocation of its Medicaid authority to impose independent regulatory requirements on drug manufacturers was consistent with the Medicaid Act. *Id.* at 649-650. Thus, unlike this case, the state law at issue in *PhRMA* constituted an affirmative exercise of the State's authority to create and enforce what were in essence regulatory requirements governing primary conduct. In bringing suit, the manufacturers were in effect asserting an immunity from those regulations.

inconsistent with federal law. *Id.* at 93-94.[13] Such decisions illustrate the traditional operation of the negative injunction applied in *Ex parte Young* that permits "'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (quoting *VOPA*, 131 S. Ct. at 1642 (Kennedy, J., concurring)); see *Planned Parenthood of Kansas & Mid-Missouri* v. *Moser*, 747 F.3d 814, 829-830 (10th Cir. 2014).

Under the circumstances of this case, respondents cannot avail themselves of that equitable cause of action. They concededly are "not subject to or threatened with any enforcement proceeding like the one in *Ex parte Young*." *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting). Rather, respondents "simply seek a private cause of action [that] Congress chose not to provide." *Ibid.*

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[13] See also, *e.g.*, *Verizon Md.*, 535 U.S. at 642-643 (challenge by telecommunication carrier to order of state utility commission); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001) (suit by tobacco companies challenging state restrictions on tobacco advertising); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (challenge by utilities to conditions on construction of nuclear plants); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963) (suit by farmers challenging state law regulating sale of avocados).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES AND TWELVE OTHER ORGANIZATIONS FOR RESPONDENTS

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ADAPT
The Autistic Self Advocacy Network
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Disability Rights Education and Defense Fund
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INTEREST OF *AMICI CURIAE*

Amici Curiae are thirteen associations of people with disabilities and public interest groups that advocate for the rights of people with disabilities, including American Association of People with Disabilities, National Alliance on Mental Illness, The Arc of the United States, National Council for Behavioral Health, The National Federation of the Blind, ADAPT, The Autistic Self Advocacy Network, The Quality Trust for Individuals with Disabilities, Disability Rights Education and Defense Fund, Judge David L. Bazelon Center for Mental Health Law, Center for Public Representation, Disability Rights New York, and Disability Rights Ohio.[1] The separate interests of *amici* are set out in Appendix A.

Amici submit this brief because private suits with respect to the Medicaid Act – under both section 1983 and the Supremacy Clause – are critical to assure that people with disabilities, particularly those who live in poverty or are elderly, get the health care they need and deserve, and that they have recourse to the federal courts and do not need to depend on an overburdened federal agency to revoke funding when they do not receive such care.

Such necessary Medicaid Act services include the home- and community-based programs serving

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[1] Petitioner and Respondent have consented to the filing of this brief. Counsel for *amici* authored the entire brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

people with disabilities at issue in this suit – "residential habilitation" services, provided in supported living environments, and designed to help people with intellectual disabilities[2] to live successfully in the community. Pet. App. 16.[3] This Court affirmed in *Olmstead v. L.C.*, 527 U.S. 581, 600, 601 (1999), that requiring people with disabilities to receive care in an institution, rather than in their homes and communities, "severely diminishes" their quality of life, including "family relations, social contacts, work options, economic

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[2] *Amici* use the term "intellectual disability" in place of "mental retardation" except when directly quoting others. Although the latter term appears in some relevant case law, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As this Court stated in *Hall v. Florida*: "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon ... This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts..." 134 S. Ct. 1986, 1990 (2014) (citing Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (changing entries in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et al., "The Renaming of *Mental Retardation*: Understanding the Change to the Term *Intellectual Disability*," 45 Intellectual & Developmental Disabilities 116 (2007); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013)).

[3] Such services include, but are not limited to, skills training, and assistance with decision-making, money management, socialization, mobility, and behavior shaping or management, as well as grooming, bathing, eating, administering

independence, educational advancement, and cultural enrichment" and also "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life."

Before the injunction in this case, Idaho had not changed its payment rates for home- and community-based services since 2006, even though the state itself recommended that rates be increased substantially and the federal Center for Medicaid and Medicare Services ("CMS") approved that increase. Pet. App. 18-19; Pet. Opp. 1-2 & n.1. Until providers brought this preemption suit under the Supremacy Clause, payment for such services stayed at the 2006 level. As a result of the suit payments were substantially increased. For 2013, for instance, the state paid $12 million in additional reimbursements under the revised rates. See *Idaho Asks Supreme Court to Take Medicaid Case*, Associated Press (July 3, 2014) *available at* http://www.spokesman.com/stories/2014/jul/03/idaho-asks-supreme-court-to-take-up-medicaid/. That result vividly illustrates why this Court should not reach out to interfere with over 200 years of established law by limiting preemption suits under the Supremacy Clause.

SUMMARY OF ARGUMENT

Even though this case presents only the issue whether plaintiffs can bring a preemption claim

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medications, meal preparation, laundry, shopping and the like, as well as skills training for family and other caregivers. *Id.*

under *one* Medicaid Act provision, 42 U.S.C.A. § 1396a(a)(30)(A), petitioners suggest that the Medicaid Act as a whole is not enforceable by private plaintiffs at all, under either the Supremacy Clause or 42 U.S.C.A. § 1983. See Pet. Br. 28-29. That is decidedly not so. To the contrary, as detailed in Section I below, section 1983 is still the primary means of enforcing the Medicaid Act. Courts have applied this Court's framework developed in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and *Blessing v. Freestone,* 520 U.S. 329 (1997), to a variety of other Medicaid Act provisions and permitted section 1983 actions to enforce them.

Accordingly, section 1983 actions are available to enforce provisions of the Medicaid Act that guarantee care to all eligible people on the same terms; guarantee that they will receive such care with "reasonable promptness"; guarantee that they are informed of and permitted to choose feasible non-institutional care; guarantee that they are treated appropriately in nursing homes; and guarantee that if they are under twenty-one they will be assessed regularly and receive care deemed necessary during such assessments. *See* Section I, *infra*. Congress intended to permit section 1983 actions under all these separate provisions, these courts concluded, because they contain the type of individual rights creating language and meet the other requirements this Court's cases set forth,

With respect to the issue actually presented here, a long line of cases from the earliest days of the country's history have permitted private plaintiffs to bring actions to enjoin state statutes, regulations,

policies, or practices when they conflict with a governing federal law under the Supremacy Clause. These cases do not require that plaintiffs establish a separate "private right of action" under the law that governs section 1983 in order to rely on the Constitution for a preemption claim. As respondents' brief explains in detail, under this established law the Ninth Circuit's opinion should be affirmed.

Finally, it makes no difference to this result that this case involves state *inaction* preempted by federal law, rather than the state action presented by the typical preemption case. To the contrary, this Court has recognized before that inaction, as well as action, may be preempted by federal law under the Supremacy Clause. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (city's failure to renew franchise license to gain leverage in labor dispute preempted by federal labor law).

ARGUMENT

I. Many provisions of the Medicaid Act are enforceable under 42 U.S.C.A. § 1983

This case presents only the question whether a particular provision of the Medicaid Act—42 U.S.C.A. § 1396a(a)(30)(A)—can be privately enforced through a preemption cause of action. But some of petitioners' arguments suggest that the Medicaid Act in general cannot be privately enforced through *any* cause of action, whether arising under the Supremacy Clause or under 42 U.S.C.A. § 1983. See Pet. Br. 28-29.

Respondents' brief describes in detail why the lack of a private right of action under section 1983 does not foreclose a claim under the Supremacy Clause that a state law conflicts with a federal law. Respondents Br. at 21-28, 47-54. As Respondents explain in particular, the lack of a Section 1983 cause of action to enforce 42 U.S.C.A. § 1396a(a)(30)(A) does not bar a basic preemption claim when a state law or action directly conflicts with Section 30(A).

Amici believe, however, that it is important for the Court to understand the extent to which section 1983 itself continues to provide an important source of enforcement for a wide variety of Medicaid Act provisions. These claims help ensure that people with disabilities, or those who are poor or elderly, receive the medical care to which the statute entitles them. Such section 1983 claims remain the mainstay of Medicaid enforcement. Some of the numerous Medicaid Act provisions for which private parties may bring a claim under section 1983 include:

(1) 42 U.S.C.A. § 1396a(a)(10). Claims by people who did not receive various Medicaid services to which they are entitled under 42 U.S.C.A. § 1396a(a)(10), which requires states to make medical assistance available to "all [eligible] individuals" in the same amount, duration, and scope as other eligible individuals.

Cases so holding include: *Watson v. Weeks*, 436 F.3d 1152, 1155, 1159–62 (9th Cir. 2006), *cert. denied sub nom. Goldberg v. Watson*, 549 U.S. 1032

(2006) (allowing section 1983 claim by a class of elderly patients and people with disabilities that Oregon violated §1396a(a)(10) by reducing nursing home services as part of budget cutting measures); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 181, 182 (3d Cir. 2004) (allowing section 1983 claim by a class of persons with intellectual disabilities seeking access to "intermediate care facilities" after "languish[ing] on waiting lists for years," finding that § 1396a(a)(10), among other provisions, created a private right of action); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1142, 1143 (10th Cir. 2006) (allowing section 1983 claim by a class of hundreds of people with developmental disabilities on waiting lists for residential services under 42 U.S.C.A. § 1396a(a)(10) and other provisions based on other circuit precedent "without deciding" whether such claim was appropriate), *cert. denied*, 549 U.S. 1305 (2007); *Brontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604 (7th Cir. 2012) (allowing section 1983 claim under 42 U.S.C.A. § 1396a(a)(10) by beneficiary with claim for medically necessary dental services that exceeded state limit of $1,000 for such services), *cert. denied*, 133 S.Ct. 2002 (2013).

(2) 42 U.S.C.A. § 1396a(a)(8). Claims by people who did not receive Medicaid services with "reasonable promptness" as required by 42 U.S.C.A. § 1396a(a)(8).

Cases so holding include: *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002) (allowing section 1983 claim by people with acquired brain disorders to the state's failure to fill available slots for home care services rather than

institutionalization); *Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) (allowing section 1983 claim by individual with developmental disabilities, including epilepsy, mild mental retardation, and cerebral palsy, to state's failure to provide her with residential services required by her plan of care), *cert. denied*, 128 S.Ct. 1483 (2008); *Sabree*, 367 F.3d at 181, 182 (allowing section 1983 claim by a class of persons with intellectual disabilities seeking access to "intermediate care facilities" after "languish[ing] on waiting lists for years," finding that §§ 1396a(a)(8), among other provisions, created a private right of action); *Mandy R.*, 464 F.3d at 1142, 1143 (allowing section 1983 claim by a class of hundreds of people with developmental disabilities on waiting lists for residential services under 42 U.S.C.A. § 1396a(a)(8) and other provisions based on other circuit precedent "without deciding" whether such claim was appropriate).[4]

(3) 42 U.S.C.A. §§ 1396n(c)(2), (d)(2). Claims by people with disabilities that they were not properly informed of or allowed to choose feasible alternatives to care in an institution, as required by 42 U.S.C.A. §§ 1396n(c)(2), (d)(2).

Cases so holding include: *Ball v. Rodgers*, 492 F.3d 1094, 1107 (9th Cir. 2007) (permitting section 1983 claim by people with physical and

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[4] *Accord Doe 1-13 By & Through Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 711 (11th Cir. 1998) (allowing section 1983 claim by people with developmental disabilities who had been on waiting lists for intermediate care facilities for "several years" without receiving services).

developmental disabilities and elderly people that by not hiring or compensating sufficient home-care attendants Arizona did not provide them with a feasible choice for non-institutional care, holding that individuals have "two explicitly-identified rights" under section 1396: "the right to be informed of alternatives to traditional, long-term institutional care," and "the right to *choose* among those alternatives") (emphasis in original).

(4) 42 U.S.C.A. § 1396a(a)(15). Claims by people with disabilities who did not receive treatment in intermediate-care facilities as required by 42 U.S.C.A. § 1396a(a)(15). *E.g.*, *Sabree*, 367 F.3d at 181, 182 (allowing section 1983 claim by a class of persons with intellectual disabilities seeking access to "intermediate care facilities" after "languish[ing] on waiting lists for years," finding that 42 U.S.C.A. § 1396d(a)(15), requiring that the state provide intermediate care services, provided for a private cause of action, along with other provisions.

(5) 42 U.S.C.A. § 1396r. Claims by people in nursing homes that the state did not provide them with the level of care required by 42 U.S.C.A. § 1396r, which requires among other things that nursing homes must provide care necessary to promote maintenance and quality of life and must undertake assessments and have plans to provide appropriate care to each resident.

Cases so holding include: *Rolland v. Romney*, 318 F.3d 42, 44, 56 (1st Cir. 2003) (allowing section 1983 claim by people with developmental and intellectual disabilities because the state did not

provide them with the "specialized services" necessary to meet their needs in a nursing home setting, as required by 42 U.S.C. § 1396r); *Grammer v. John J. Kane Reg'l Centers-Glen Hazel*, 570 F.3d 520 (3d Cir. 2009) (allowing section 1983 claim by a daughter claiming that the nursing home treating her mother did not provide the care required by 42 U.S.C.A. § 1396r, with the result that the mother developed ulcers, became malnourished and eventually developed sepsis and died), *cert. denied*, 559 U.S. 939 (2010).

(6) 42 U.S.C.A. § 1396a(bb). Claims by providers that the state did not pay for required services provided at federally-qualified health centers and rural clinics located in medically-under-served communities, in violation of 42 U.S.C.A. § 1396a(bb).

Cases so holding include: *California Ass'n of Rural Health Clinics v. Douglas*, 738 F.3d 1007, 1011 (9th Cir. 2013) (permitting section 1983 claim by providers that California improperly eliminated payments to dentists, podiatrists, optometrists, and chiropracters); *Concilio de Salud Integral de Loiza, Inc. v. Perez–Perdomo*, 551 F.3d 10, 17–18 (1st Cir. 2008) (permitting section 1983 claim by providers that Massachusetts had not fulfilled its obligation to make wraparound payments under section 1396a(bb) that were necessary to compensate clinic for difference between amounts due and amounts previously paid); *Pee Dee Health Care, P.A. v. Sanford*, 509 F.3d 204, 210–12 (4th Cir. 2007) (permitting section 1983 claim by providers that South Carolina paid unduly low rates (but finding

specific contract with provider limited the availability of claim)); *Rio Grande Cmty. Health Ctr., Inc. v. Rullan*, 397 F.3d 56, 74–75 & n. 12 (1st Cir. 2005) (permitting section 1983 claim by providers that state failed to make "wraparound" payments required by section 1396a(bb)(5) that were necessary to compensate clinic for difference between amounts due and amounts previously paid and assure continued cash flow).

(7) 42 U.S.C.A §§ 1396d(4)(B), 1396d(r)(5), 1396d(a). Claims by beneficiaries that states did not provide medically necessary services for children, as required by Medicaid Act provisions requiring the state to provide "early and periodic screening, diagnosis, and treatment services" for certain persons under age twenty-one (the "EPSDT" mandate, 42 U.S.C.A. §§ 1396a(a)(10)(A), 1396d(4)(B), 1396d(a)) and further requiring the state to reimburse certain services found necessary in such a screening even if the state would not otherwise cover those services (42 U.S.C.A. §§ 1396d(r)(5), 1396d(a) (listing services required to be covered)).

Cases so holding include: *Pediatric Specialty Care, Inc. v. Ark. Dept of Human Servs.*, 293 F.3d 472, 479 (8th Cir. 2002) (permitting section 1983 claim by parents and providers that state was required to provide early intervention day treatment services recommended by a doctor to children with physical and mental disabilities), *later proceeding* 443 F.3d 1005 (8th Cir. 2006) (declining state's request to revisit earlier holding under *Gonzaga*, 563 U.S. at 273 and permitting section 1983 claim

against state employees who manipulated the state's prior approval program to deny children necessary rehabilitative services) *judgment vacated as moot sub nom. Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 601-07 (5th Cir. 2004) (permitting section 1983 claim by a child with spina bifida that he was not reimbursed for the disposable undergarments necessary to address his incontinence and the resultant sores and infection, with the result that he was homebound and unable to attend school).[5]

(8) 42 U.S.C.A. §§ 1396r–6 and 1396u–1. Claims that a state improperly cut off "transitional" Medicaid benefits, which must remain available to families for a year after they lose Medicaid eligibility because of income increases under 42 U.S.C.A. §§ 1396r–6 and 1396u–1.

Cases so holding include: *Rabin v. Wilson-Coker*, 362 F.3d 190, 201 (2d Cir. 2004) (permitting section 1983 claim by families denied transitional services when they lost eligibility because income

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[5] *Accord Collins v. Hamilton*, 349 F.3d 371, 376, n. 8 (7th Cir. 2003) (section 1983 claim; "a state's discretion to exclude services deemed 'medically necessary' ... has been circumscribed by the express mandate of the statute"); *Pittman by Pope v. Sec'y, Fla. Dep't of Health & Rehab. Servs.*, 998 F.2d 887, 892 (11th Cir. 1993) (section 1983 claim; 1989 amendment adding section 1396d(r)(5) took away any discretion state might have had to exclude organ transplants from the treatment available to individuals under twenty-one) *cert. denied sub nom. Agency for Health Care Administration v. Pittman by Pope*, 510 U.S. 1030 (1993).

requirements for Medicaid were lowered rather than a new employment situation).

(9) 42 U.S.C.A. § 1396a(a)(23). Claims that a state restricted a patient's freedom of choice to obtain treatment from any qualified provider, as required by 42 U.S.C.A. § 1396a(a)(23). *E.g.*, *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't of Health*, 699 F.3d 962 (7th Cir. 2012) (permitting section 1983 claim that the Indiana law forbidding any state or federal funding to facilities providing abortions restricted low-income women from receiving Medicaid-covered services from providers of their choice), *cert. denied sub nom. Sec'y of Indiana Family & Soc. Servs. Admin. v. Planned Parenthood of Indiana, Inc.*, 133 S.Ct. 2736 (2013) and *cert. denied sub nom. Planned Parenthood of Indiana, Inc. v. Sec'y of Indiana Family & Soc. Servs. Admin.*, 133 S.Ct. 2738 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (permitting section 1983 claim that state violated "freedom of choice" statute by requiring a single supplier for certain medical supplies).

(10) 42 U.S.C.A. § 1396a(a)(3). Claims by beneficiaries who did not receive an appropriate or timely hearing on requests for Medicaid services as required by 42 U.S.C.A. § 1396a(a)(3).

Cases so holding include: *Gean v. Hattaway*, 330 F.3d 758, 772–73 (6th Cir. 2003) (permitting section 1983 claim by a class of patients based on state's failure to provide a "fair hearing" for denial of medical care under the Medicaid Act); *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012) (permitting

section 1983 claim by a class of people who applied for home health care services, were denied, and did not receive a hearing or decision within 90 days), *cert. denied*, 133 S.Ct. 1808 (2013).

(11) 42 U.S.C.A. § 1396p(d)(4). Claims that state actions or laws regarding "supplemental needs" or "special needs" trusts – i.e., trusts established pursuant to 42 U.S.C.A. § 1396p(d)(4) for people with severe and chronic or persistent disabilities to help provide for care that Medicaid does not cover – improperly permitted the state to count such trusts as "assets" and accordingly deprived beneficiaries of Medicaid coverage.

Cases so holding include: *Lewis v. Alexander*, 685 F.3d 325, 333-34, 342 (3d Cir. 2012) (permitting section 1983 claim by patients who lost benefits because of Pennsylvania law imposing additional requirements on supplemental or special needs trusts), *cert. denied*, 133 S.Ct. 933 (2013); *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 699 (8th Cir. 2012) (permitting section 1983 claim by trustee to state claim for reimbursement from a trust that was mistakenly excluded from a Medicaid beneficiaries' assets).

Those holdings were all issued *after* this Court decided *Suter v. Artist M.*, 503 U.S. 347 (1992), *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), and *Blessing v. Freestone*, 520 U.S. 329 (1997). They considered the factors the Court set out in those cases, and correctly applied them to the particular Medicaid Act provisions at issue, recognizing

implicitly (and sometimes expressly)[6] the substantial differences between those provisions and section 30A. And this Court has repeatedly denied requests to review them on *certiorari*.[7]

Indeed, Congress expressly recognized the continued importance of section 1983 and other private plaintiff suits in its response to the Court's decision in *Suter*, 503 U.S. 347. In *Suter*, the Court held that section 1983 was not available for private suits to enforce the "reasonable efforts" provision of the Adoption Act, another part of the Social Security Act along with the Medicaid Act.

Congress promptly acted to change that result, providing that "[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its

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[6] *Ball*, 492 F.3d at 1102, 1107-17 (Medicaid Act's free choice provisions (42 U.S.C.A. §§ 1396n(c)(2)(C), (d)(2)(C)) may be enforced through section 1983 cause of action, but equal access provision (42 U.S.C.A. § 1396a(a)(30)(A)) may not); *Mandy R.*, 464 F.3d at 1142 (relying on other Circuits' precedent to permit a section 1983 claim under Medicaid's reasonable promptness and comparability provisions, sections 1396a(a)(8) and 1396a(a)(10), but finding no section 1983 claim permissible under section 1396a(30)(A)).

[7] *See, e.g.*, *Shakhnes*, 689 F.3d at 244, *cert. denied*, 133 S.Ct. 1808 (2013) (regarding section 1396a(a)(3)); *Brontrager*, 697 F.3d at 604, *cert. denied*, 133 S.Ct. 2002 (2013) (regarding section 1396a(a)(10)(A)); *Lewis*, 685 F.3d at 325, *cert. denied*, 133 S.Ct. 933 (2013) (regarding sections 1396a(a)(18), 1396p(d)(4)(C)); *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't. of Health*, 699 F.3d at 962, *cert. denied*, 133 S.Ct. 2736, 2738 (2013) (regarding section 1396a(a)(23)).

inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." In so doing, it made plain that the law in effect before *Suter* – including both section 1983 law and preemption law under the Supremacy clause – would continue to govern suits under the Medicaid Act. The text of the post-*Suter* statute specifically explained that it did not "intend to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements." 42 U.S.C.A. § 1320a-2; see 42 U.S.C.A. § 1320a-10 (similar). Similarly, the Conference Report explained that "[t]he intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the [SSA] are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*" H.R. Rep. No. 103-761, at 926 (1994) (Conf. Rep.).

These statements indicate that Congress, acting against a backdrop of the numerous section 1983 and preemption actions that had been permitted in the Medicaid Act context, meant for private plaintiffs to retain the ability to bring such actions. Under Congress' reasoning following *Suter* and under the cases cited above, section 1983 continues to provide important individual protections for people who rely on Medicaid for health care, including the people with disabilities who are members of *amici* organization or whose rights the *amici* organizations represent.

II. Even When Section 1983 Does Not Provide A Private Right Of Action, Private Plaintiffs May Sue To Enjoin State Laws That Are Preempted By The Medicaid Act

Even when a Medicaid Act provision, unlike the numerous provisions outlined above, does not permit a private right of action under section 1983, Medicaid beneficiaries, providers, and other private parties who are injured by a state law that conflicts with the Medicaid Act have a recourse in federal court. As Respondents' Brief explains in detail, this Court, relying on principles established since the early days of this country, has consistently permitted private plaintiffs injured by a state law, regulation, policy, or practice that conflicts with federal law to seek an injunction under the Supremacy Clause. It has not imported the principles governing whether there is a private right of action under section 1983 into this established analysis. This Court should reject Petitioners' urging that it do so now.

The Supremacy Clause is clear on its face. It says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

> Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI. The Supremacy Clause does not say that it is purely a choice-of-law rule, as Petitioners assert. It does not say that it can be relied upon only if Congress has separately authorized a statutory private right of action under section 1983. It says federal law governs over state law, full stop.

Consistent with this language, and again as set forth in detail in Respondents' brief, this Court has repeatedly recognized that private plaintiffs may obtain injunctive relief when a state law conflicts with the Medicaid Act and similar Spending Clause provisions *without* requiring a determination that Congress intended to create a statutory private right of action as a prerequisite to such suit.

Just two Terms ago, the Court applied established preemption analysis in a Medicaid Act case without once mentioning, in majority, concurring or dissenting opinion, any necessity for Congress to have intended to create a private right of action under the relevant provision. In *Wos v. E.M.A. ex rel. Johnson*, 133 S.Ct. 1391 (2013), a North Carolina statute provided that the state could collect one-third of a Medicaid claimant's tort recovery. This conflicted with federal Medicaid law in 42 U.S.C.A § 1396p(a)(1), which prohibits a state from collecting any part of a judgment or settlement that is not attributable to medical damages. The majority explained that "Under the Supremacy Clause, '[w]here state and federal law "directly

conflict,'" state law must give way" and affirmed the Fourth Circuit's determination that North Carolina's statute in fact did directly conflict with the Medicaid Act's requirement. *Id.* at 1398.[8] *Accord Ark. Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (holding that state law regarding collection of Medicaid recipient's tort recovery that conflicted with the Medicaid Act's anti-lien provision was preempted, without discussion of any necessity of finding a private right of action).

In a number of other cases, the Court similarly has decided whether a state law is preempted by Medicaid Act or similar Spending Clause provisions while somehow failing to mention that a Congressional intent to create a private right of action is a prerequisite to such suits. *See, e.g., PhRMA v. Walsh*, 538 U.S. 644 (2003) (considering provider claim that federal Medicaid law regarding prescription drug rebates under 42 U.S.C.A § 1396r-8 preempted a Maine law requiring participating providers to provide such rebates with respect to all drugs sold in the state, without considering whether Congress intended a private right of action); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478 (1996) (federal law requiring Medicaid funding for abortions in cases of rape and incest preempted state law prohibiting any use of state or federal funds for abortions, without considering whether Congress intended a private right of action); *Bennett*

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[8] The Court mentioned that the original case was brought under section 1983, *id.* at 1396, but that fact was not mentioned again in either majority or dissent.

v. Arkansas, 485 U.S. 395, 397 (1988) (*per curiam*) (Social Security Act "unambiguously rules out any attempt to attach Social Security benefits," while the Arkansas statute at issue in the case "just as unambiguously allows the State to attach those benefits," thus creating "a 'conflict' under the Supremacy Clause –a conflict the State cannot win"; no mention of need for private right of action); *Blum v. Bacon*, 457 U.S. 132, 138 (1982) (Social Security Act provision requiring state to provide emergency assistance to beneficiaries preempted state welfare regulations that forbade such assistance when the beneficiary's funds were stolen or lost; no motion of need for private right of action); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972) (Social Security Act eligibility requirements for AFDC, which relied in part on a parent's "continued absence" from home, preempted a California law excluding a parent's absence because of military service; no mention of need for private right of action). *See generally* Respondents Br. 24-25, 35-37.

These cases in the Medicaid Act context are consistent with many others from this Court recognizing that federal courts must vindicate the supremacy of federal law on a claim by a private plaintiff that it conflicts with state law without separately requiring a showing that Congress created a private right of action for those claims. This history is detailed in Respondents' brief, 11-15. It confirms that, as the United States says, the "longstanding judicial practice [that] private parties may bring a suit in federal court to enjoin state regulatory action from which the plaintiffs claim immunity under federal law" "has considerable

historical grounding and appropriately vindicates the supremacy of federal law." United States Br. at 8, 16.

As Respondents explain, (1) the Supremacy Clause has decidedly not been limited to cases which present an "anticipatory defense" to state action, and in any event this case would fit the mold of an anticipatory defense, Respondents Br. 21-28; (2) the Supremacy Clause has long been available to enforce provisions of the Medicaid Act and other Spending Clause statutes, see Respondents Br. 35-37; and (3) there are real and substantial differences between implied rights of action under section 1983 and Supremacy Clause claims based on the Constitution that dictate that the law governing the first should not be imported into the law governing the second, Respondents Br. 47-56. Accordingly, this Court should reject petitioners' effort to confine preemption claims to those that could be brought under Section 1983.

III. Although This Case Involves A Preemption Challenge To State Inaction Rather Than To An Affirmative State Statute, The Same Principles Apply

This case involves a situation that is arguably more complicated than the typical preemption case. Typically, private plaintiffs in a preemption case contend that a particular state *action* – an affirmative state statute, regulation, policy, or practice – is inconsistent with federal law and thus seek an injunction *forbidding* the State from enforcing the provision. *E.g.*, *Wos*, 133 S.Ct. at 1391

(enjoining North Carolina statute allowing state to collect one-third of a Medicaid claimant's tort recovery as inconsistent with federal law); *Dalton*, 516 U.S. at 478 (enjoining state law precluding use of any federal or state funds for abortions as inconsistent with federal law); *Bennett*, 485 U.S. at 397 (enjoining state attachment of Social Security benefits for children in custody as inconsistent with federal law); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (enjoining Massachusetts statute regarding dealings with Burma as inconsistent with federal foreign policy); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (enjoining city ordinance that limited flight landing hours as inconsistent with federal law).

Here, at least on this record, the situation is arguably different, as it involves Idaho's *inaction*, rather than action. The allegation is not that Idaho passed a statute or promulgated a regulation that is inconsistent with federal law, but rather that it failed to take action that the respondents contend would be required in order to comply with such law. Pet. App. 21 (case involves Idaho's "failure to amend existing reimbursement rates"); *id.* at 4 n.2. As the trial court noted, "Plaintiffs do not challenge the propriety of a rate change action. Instead, they challenge [Idaho's] inaction, or failure to amend existing reimbursement rates." Pet. App. 21.

Respondents accordingly did not seek an injunction that would forbid enforcement of an Idaho law, but rather an injunction that would require the State to take affirmative action – change its rate

program – in order to comply with federal law. Since the injunction, rates for the home and community based waiver program in Idaho have been revised and increased to follow the previously-rejected recommendations.

The Ninth Circuit expressed "serious doubt over whether [Idaho's] inaction constitutes a 'Thing' in state law that can be preempted under the Supremacy Clause." Pet. App. 4 n. 2. *Accord id.* at 2 (Medicaid provider "has an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation.") The district court noted, similarly, that "Ninth Circuit cases addressing alleged violations of §30A have involved changes to reimbursement rates or methodologies, not maintenance of existing rates." Pet. App. 21.

Under the cases set out above and in Respondents' brief, however, this is a distinction without a difference. The Medicaid Act provides that that states accepting federal Medicaid finds must set provider reimbursement rates using "such methods and procedures" as necessary to assure, *inter alia*, that payments are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C.A. § 1396a(a)(30)(A). As the legislative history notes, "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the [Medicaid] program." H.R. Rep. No. 101-247, at 390 (1989).

There is, of course, no question of constitutional power here. Congress is free to condition the grant of federal funds on recipient states' agreement to take affirmative governmental action with the money they receive. See *New York v. United States*, 505 U.S. 144, 166-167 (1992). As Part I, *supra*, demonstrates, Congress has done just that in the Medicaid Act. As the many cases cited in Part I illustrate, these state obligations under the Medicaid Act often confer on individual beneficiaries an affirmative right to services—a right they may enforce under Section 1983. And Congress is free to impose affirmative obligations on the recipients of federal funds and to authorize private parties to enforce them through statute-specific rights of action. See, *e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) (private suit enforcing affirmative right of children with disabilities to receive a "free appropriate public education" under the Individuals with Disabilities Education Act). The only question here is whether private parties can enforce affirmative obligations through preemption suits in instances in which the relevant statute does not confer individual rights enforceable under Section 1983 or another express private cause of action.

This Court should answer that question in the affirmative. Idaho has done exactly what section 30A forbids. It has not provided payments sufficient to ensure that people who need home and community-based services receive them. That it did so through inaction rather than action is immaterial. In at least one case, this Court has held similar state inaction formed a basis for a preemption claim. *See Golden State Transit Corp. v. City of Los Angeles,*

475 U.S. 608, 617 (1986) (city was not permitted to let a taxicab franchise renewal application lapse in order to force taxicab company to resolve a labor dispute; its failure to act was preempted by federal labor law requiring each side "free use of economic weapons"). *Accord Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 511, 512 (2d Cir. 2002) (state could not fail to act on approving a union's proposed training/apprenticeship program in order to encourage the union not to bring a labor dispute; "we think defendant's refusal to act threatens to skew the collective bargaining process by placing economic pressure on plaintiffs"; "we believe defendant's inaction, rather than its action, is barred by *Garmon* preemption."). Accordingly, that respondents challenge the state's inaction should make no difference to the preemption cause of action analysis.

CONCLUSION

The Court should affirm the decision of the Ninth Circuit.

Respectfully submitted.

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APPENDIX

THE AMICI ORGANIZATIONS

The American Association of People with Disabilities ("AAPD") is the Nation's largest cross-disability membership organization, advocating for equal opportunity, economic empowerment, and political participation for persons with disabilities. The organization's more than 100,000 members come from all states and include persons with disabilities and their families, friends and supporters. Founded in 1995 and headquartered in Washington, D.C., AAPD has a strong interest in the full enforcement and implementation of the Medicaid Act, which provides for services vital to people with disabilities.

The National Alliance for the Mentally Ill ("NAMI") is the nation's largest grassroots organization dedicated to improving the lives of people with mental illnesses. NAMI has more than 220,000 members and 1,200 state and local affiliates in all 50 states, the District of Columbia, Puerto Rico and Canada. Since its creation in 1979, NAMI's members have worked extensively on a national basis to combat barriers to the recovery of people with mental illness and their full participation in society. NAMI works for full enforcement and implementation of the Medicaid Act, which provides for services vital to people with mental illness.

The Arc of the United States ("The Arc") is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc advocates for the rights and full participation of all children and

adults with intellectual and developmental disabilities. It provides an array of services and support for families and individuals and includes 140,000 members affiliated through 700 state and local chapters across the nation. The Arc is devoted to ensuring the full implementation of the Medicaid Act and its chapters bring litigation enforcing the right of beneficiaries to services under the Act.

National Council for Behavioral Health ("National Council") is the voice of America's community mental health and addiction treatment organizations. Together with our 2,200+ member organizations employing 750,000 staff, the National Council serves our nation's most vulnerable citizens, more than eight million adults and children living with mental illnesses and addictions. The National Council is committed to ensuring all Americans have access to comprehensive, high-quality care that affords the opportunity for recovery and full participation in community life. The National Council is committed to full implementation of the Medicaid Act as a critical step toward ensuring that people with mental illness have access to adequate health care.

The National Federation of the Blind ("NFB") is the largest membership organization of blind people in the United States. With more than 50,000 members, and affiliates in all fifty states, in the District of Columbia, and in Puerto Rico, and over 700 local chapters in most major cities, the NFB works for the integration of the blind into society on an equal basis. Since its founding in 1948, the NFB

has devoted significant resources toward advocacy, education, research, and development of programs for the blind. The NFB actively engages in litigation on behalf of the blind to address systemic barriers.

ADAPT is a national grass-roots community that organizes disability rights activists to engage in nonviolent direct action, including civil disobedience, to assure the civil and human rights of people with disabilities to live in freedom. ADAPT engages in political advocacy and litigation to advance the rights of people with disabilities to community-based services under the Medicaid Act.

The Autistic Self Advocacy Network ("ASAN") is a nationwide nonprofit organization run by and for individuals on the autism spectrum. ASAN promotes the interests of autistic adults and children through public policy advocacy, education, research, and cultural outreach activities. Many of ASAN's constituents rely on services provided through federal Spending Clause statutes such as the Medicaid Act.

The Quality Trust for Individuals with Disabilities ("Quality Trust"), incorporated in 2001, is an independent, nonprofit advocacy organization dedicated to ensuring that people with disabilities have access to the supports and services they need to live full and meaningful lives in the places and ways they choose. The Quality Trust has supported well over 5,000 people with disabilities, the vast majority of whom are low-income, and trained thousands of people with disabilities, family

members, advocates, attorneys, guardians, providers and health care workers on a wide range of disability policy and practice topics. The Quality Trust supports full implementation and enforcement of the Medicaid Act.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national non-profit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the community it represents. Recognized for its expertise in the interpretation of federal disability civil rights laws, including the Medicaid Act, DREDF pursues its mission through education, advocacy and law reform efforts.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center") is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. Through litigation, federal policy advocacy, and public education, the Bazelon Center promotes equal opportunity for individuals with mental disabilities in all aspects of life, including health care, employment, education, housing, and community living. The Bazelon Center actively engages in litigation to enforce beneficiaries' entitlements under the Medicaid Act.

Center for Public Representation ("CPR") seeks to improve the quality of lives of people with mental illness and other disabilities through the systemic enforcement of their legal rights while promoting improvements in services for citizens with disabilities. Based in Massachusetts, CPR r is engaged in litigation and advocacy throughout the nation. Through its systemic activities during the past 30 years, CPR has been a major force in promoting improvements in services for citizens with disabilities. CPR has brought numerous cases enforcing the rights of Medicaid beneficiaries to needed community-based services.

Disability Rights New York ("DRNY") is the federally-mandated Protection & Advocacy Agency for persons with disabilities in New York. DRNY advocates for the civil and legal rights of New Yorkers with disabilities, including rights under the Medicaid Act.

Disability Rights Ohio ("DRO") is the federally-mandated Protection & Advocacy Agency for persons with disabilities in Ohio. DRO advocates for the civil and legal rights of Ohio's citizens with disabilities, including rights under the Medicaid Act.

RECORD AND BRIEFS

14-15

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IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,

Petitioners,

—v.—

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, THE MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended civil liberties for over ninety years, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. The ACLU has appeared before this Court in numerous civil rights cases, both as direct counsel and as amicus curiae.

The **NAACP Legal Defense & Educational Fund, Inc.** ("LDF") is a non-profit legal organization established to assist African Americans and other people of color in securing their civil and constitutional rights. For more than six decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the Supreme Court and other federal courts on matters of race discrimination, including through the type of direct constitutional enforcement actions at issue in this case.

The **Mexican American Legal Defense and Educational Fund** ("MALDEF") is a national civil rights organization established in 1968. Its principal

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[1] All parties have filed blanket consents to the submission of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in the federal courts throughout the nation, including the Supreme Court. MALDEF's mission includes a commitment to protect the rights of immigrant Latinos in the United States, and MALDEF has asserted preemption theories in federal court to further this commitment.

The **Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a national non-profit civil rights organization that was founded in 1963 at the request of President John F. Kennedy to marshal the resources of the private bar to defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination, including many involving Constitutional claims. The Lawyers' Committee ability to vindicate the Constitutional rights of its clients is dependent upon the openness of the federal courts to hearing those claims.

SUMMARY OF ARGUMENT

Enforcement of the Constitution is not dependent on affirmative action by the political branches of government. Rather, from this Nation's earliest times to the present, the federal courts have consistently exercised their equitable powers to compel compliance with the Constitution, without suggesting the necessity for a statutory vehicle, such as 42 U.S.C. § 1983, for such authority. Those

equitable powers have been, and continue to be, particularly important for racial and ethnic minorities, immigrants, persons with disabilities, low-income individuals, and others whom our majoritarian political processes are often unwilling or unable to protect against constitutional violations. Indeed, direct actions brought to enforce compliance with the Constitution have resulted in many of this Court's most important civil rights and civil liberties decisions, including *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Terry v. Adams*, 345 U.S. 461 (1953), *Truax v. Raich*, 239 U.S. 33 (1915), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); in none of those cases did the Court suggest that it was acting under § 1983 or another statutory vehicle. That history is consistent with the many cases in which this Court enforced other provisions of the Constitution, such as the Contracts Clause and Commerce Clause, as well as structural principles of federalism and separation of powers.

Such direct actions are also available to enforce a claim of preemption under the Supremacy Clause, including where the preemption is based on a statute enacted under Congress's spending power. This Court has entertained and sustained many direct actions based on federal preemption, recognizing the appropriateness of such actions to vindicate the supremacy of federal law. Petitioner suggests that direct preemption actions should be drastically restricted to situations in which federal law creates a defense to threatened state action, but that rule would seriously undermine the supremacy of federal law. In many contexts, a direct action is the only way in which the supremacy of federal law can be established. Moreover, allowing plaintiffs to

raise their Supremacy Clause claims alongside other constitutional claims is more efficient than Petitioner's overly restrictive approach.

Direct actions remain critical to vindicate the supremacy of federal law. This is especially true for racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals, who in many circumstances have difficulty obtaining access to, or support from, the federal political branches, and who often depend on a judicial remedy to prevent enforcement of state laws that conflict with federal laws. In contexts as diverse as immigration, housing, and public assistance, direct actions remain the only effective avenue to ensure the supremacy of federal law. Eliminating that avenue would seriously undermine the force and power of federal law.

For practical and political reasons, the United States does not bring enforcement actions against every state law that violates the Supremacy Clause. Termination of federal funding is even rarer and can be counterproductive. Absent direct actions brought to establish the supremacy of federal law by those most directly affected by preempted state laws, there would frequently be no meaningful remedy for state noncompliance with this fundamental Constitutional safeguard.

ARGUMENT

I. THE JUDICIARY'S LONGSTANDING AUTHORITY TO ENFORCE THE CONSTITUTION THROUGH DIRECT ACTIONS HAS BEEN PARTICULARLY CRITICAL FOR CIVIL RIGHTS AND CIVIL LIBERTIES.

This Court has long recognized that the strictures of the Constitution may be enforced through direct actions for equitable relief, regardless of whether Congress has enacted legislation specifically establishing a cause of action for such relief. So long as the court has subject-matter jurisdiction over the claim, separate legislation establishing a cause of action has never been necessary for a plaintiff to obtain forward-looking relief from unconstitutional conduct. Rather, the traditional equitable authority of the courts has always been deemed sufficient to provide such a remedy. The Court has adhered to this principle in many contexts—whether the constitutional claim was brought against federal, state, or local officials; whether the claim was brought to enforce individual constitutional rights or to enforce structural principles in the Constitution; and whether or not the claim was brought to preclude an anticipated enforcement action.

The courts' inherent equitable authority to compel compliance with the Constitution is implicit in the structure of the Constitution itself, and in the Constitution's status as the supreme law of the land. *See* Resp. Br. 7-15. As the Court recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803),

judicial review is necessary as a check against the aggrandizement of power by the political branches. These structural principles not only protect each branch from intrusion by the others, but they also protect individuals from the abuse of governmental power. *See Bond v. United States*, 131 S. Ct. 2355, 2363-2364 (2011). Thus, as Chief Justice Marshall explained, "[t]he very essence of civil liberty" is "the right of every individual to claim the protection of the laws, whenever he receives an injury." 5 U.S. (1 Cranch) at 163. Although federal legislation may channel the way in which constitutional claims are entertained by the courts, the courts have long understood that the right to compel compliance with the Constitution is not contingent on the assent of the political branches. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (stressing that a "'serious constitutional question'" would arise if the political branches attempted to preclude any judicial forum for constitutional claims by failing to make statutory allowance for such claims); *see also* Federalist No. 78 (Hamilton) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order to keep the latter within the limits assigned to their authority.").

A. Civil Rights Claims Have Long Been Enforceable Through Direct Actions.

The ability to enforce rights directly under the Constitution has been particularly important for racial and ethnic minorities, immigrants, persons with disabilities, low-income individuals, and other persons who have faced systemic barriers in our majoritarian political process and thus have often depended on the federal courts to secure their rights

when Congress and the Executive Branch have been unable or unwilling to do so.[2] Some of this Court's (and this country's) most significant steps toward achieving equality and liberty have resulted from plaintiffs' enforcement of their rights directly under the Constitution. And that was particularly true in the long period before this Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), which revived 42 U.S.C. § 1983 as a vehicle for private enforcement of constitutional rights.

Many landmark civil rights decisions resulted from direct actions to enforce the Constitution. One such case, *Bolling v. Sharpe*, 347 U.S. 497 (1954), is a keystone of this Court's desegregation precedent. The *Bolling* plaintiffs challenged racial segregation in the public schools of the District of Columbia under the Due Process Clause of the Fifth Amendment. The Court ruled unanimously for the plaintiffs, holding that racial segregation in the District's public schools violated the Fifth Amendment. The Court nowhere suggested that the plaintiffs' ability to be heard on their due process claim depended on their ability to point to a statutory cause of action, such as § 1983.[3]

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[2] *See Chambers* v. *Florida*, 309 U.S. 227, 241 (1940) ("Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[3] Indeed, at the time, it was an open question whether § 1983 applied to the District of Columbia. The Court did not address the question until *District of Columbia v. Carter*, 409 U.S. 418 (1973), which held that § 1983 did not apply to persons acting under color of D.C. law. Congress later amended § 1983 to apply to such persons. Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93

Desegregation in higher education was advanced through another direct constitutional action, *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). After the University of Oklahoma denied the plaintiff admission to graduate school on the basis of his race, McLaurin sued for injunctive relief, alleging that the state law prohibiting integrated schools deprived him of equal protection. The district court agreed. The Oklahoma legislature then amended the statute, allowing the university to admit the plaintiff but restricting him to segregated facilities. The plaintiff returned to the district court to seek injunctive relief, which the district court denied. The Supreme Court reversed, holding that the amended state law permitting segregated facilities deprived McLaurin of his right to equal protection. *Id.* at 642. The Court nowhere suggested that McLaurin's ability to bring his constitutional claim depended on a statutory cause of action.[4]

Stat. 1284.

[4] Another landmark desegregation case, *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954)—which also did not mention the predecessor statute to § 1983—can be seen as a direct constitutional action as well, although commentators disagree on how to characterize that case. *Compare* Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 685-686 (2009) (characterizing *Brown* as a direct constitutional action) *and* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 355 (1995) (same), *with* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. Rev. 1, 1-2, 19 (1985) (characterizing *Brown* as a § 1983 suit) *and* Rodney A. Smolla, *Federal Civil Rights Acts* § 14:2, at 391-392 (3d ed. 2011) (same). Regardless,

In an equally important decision for minority voting rights, the Court in *Terry v. Adams*, 345 U.S. 461 (1953), sustained a constitutional challenge by black citizens to one of a series of schemes to maintain whites-only primary elections in Texas. Having abandoned their claim for damages, the *Terry* plaintiffs rested their equitable claims directly on the Fourteenth and Fifteenth Amendments. *Id.* at 478 nn.2 & 3 (Clark, J. concurring). The Court struck down the racially discriminatory primary as unconstitutional. *Id.* at 470; *see also id.* at 467 n.2 (plurality opinion) (noting that the Fifteenth Amendment is "'self-executing'"). In so ruling, the Court relied on its earlier decision in *Guinn v. United States*, 238 U.S. 347 (1915), which invalidated grandfather clauses under the Fifteenth Amendment, even though Congress had not enacted specific legislation reaching primary elections, due to "the self-executing power of the 15th Amendment," *id.* at 368.

Several of this Court's pathmarking decisions establishing the rights of non-citizens also reached the Court by way of direct action. For example, in *Truax v. Raich*, 239 U.S. 33 (1915), this Court held that an Arizona statute prohibiting the employment of non-citizens violated their rights to equal protection under the Fourteenth Amendment. The Court did not suggest that the case was before it under a statutory cause of action, such as § 1983, but rather stressed that the plaintiff had invoked the equitable power of the district court to restrain

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Bolling demonstrates that there is a direct right of action under the Constitution to challenge the legality of racial segregation in public schools.

unconstitutional action. Similarly, in *Terrace v. Thompson*, 263 U.S. 197 (1923), the Court, although rejecting an immigrant's constitutional claim on the merits, stressed that the power to compel compliance with the Constitution rested on the courts' traditional equitable powers, noting that equity jurisdiction will be exercised to enjoin unconstitutional state laws "wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable." *Id.* at 214.

Similarly, one of this Court's leading decisions on the meaning of "liberty" within the Due Process Clause, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), arrived at the Court by way of a direct action brought to enforce the Fourteenth Amendment and to prevent Oregon officials from implementing a state compulsory education law that would have forced all children to attend public schools. *See id.* at 530. The Court nowhere referred to a statutory cause of action under which the claim for equitable relief was brought. The district court where the case was originally brought observed that "[t]he question as to equitable jurisdiction is a simple one, and it may be affirmed that, without controversy, the jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege, or immunity, threatened or active, to the detriment or injury of a complainant, *is inherent*, unless such party has a plain, speedy, and adequate remedy at law." *Soc'y of Sisters v. Pierce*, 296 F. 928, 931 (D. Or. 1924) (emphasis added).

This theme—that the courts have inherent authority to restrain violations of the Constitution,

so long as they have subject-matter jurisdiction—runs throughout the Court's decisions and has never been seriously questioned. In *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted), the Court observed that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do"—without any mention of a statutory vehicle such as § 1983. And although Justices of this Court have debated whether *damages* should be available to remedy *past* constitutional violations in the absence of a statutory cause of action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring), the Court has never questioned courts' inherent authority to enjoin threatened or ongoing constitutional violations. *See, e.g., Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) (criticizing direct constitutional actions for damages, but acknowledging tradition of direct constitutional actions for equitable relief, and noting that "[t]he broad power of federal courts to grant equitable relief for constitutional violations has long been established").

Moreover, contrary to Petitioner's assertion (Pet. Br. 40), the Court has entertained such direct actions to enforce the Constitution regardless of whether they were "an anticipatory defense to state enforcement or regulation of the plaintiff's conduct." *See infra* pp. 19-22; *see also* Pet. Br. 45-46 (noting several preemption cases that did not involve anticipatory defenses). Indeed, where the plaintiff

could not bring the claim defensively to an enforcement action, the case for exercise of the courts' equity power is particularly compelling because the plaintiff could well have no other way to vindicate his constitutional rights. In the desegregation and voting rights cases discussed above, for example, there was no clear way for the plaintiffs seeking to vindicate their constitutional rights to have obtained a ruling on the merits of their claims except through affirmative litigation. And in *Truax*, the district court observed that the non-citizen's constitutional claim presented an appropriate case for the exercise of equity power because, under the challenged Arizona statute, only employers, not (non-citizen) employees, were subject to criminal prosecution; thus, the non-citizen employee would have had no other forum for his or her claim to be heard. *Raich v. Truax*, 219 F. 273, 283-284 (D. Ariz. 1915). If a plaintiff seeking to enforce the Constitution has no other forum in which to raise his or her claim, that provides a stronger—not a weaker—rationale for the courts to entertain a direct equitable action.

B. Constitutional Claims Outside The Civil Rights Context Have Also Long Been Enforceable Through Direct Actions.

These civil rights cases are in keeping with historical tradition, in which this Court has long recognized direct actions to enforce constitutional provisions, regardless of whether Congress has provided a specific statutory vehicle for enforcement of the Constitution.

One of the earliest examples is *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), in which this Court resolved the Bank of the United States' suit against the Ohio Auditor for collecting a state tax that conflicted with the federal statute that created the Bank. Although no statute created a cause of action for the Bank, this Court found that the dispute warranted the "interference of a Court," and it held the Ohio law unconstitutional on the ground that it was "repugnant to a law of the United States" and, therefore, void under the Supremacy Clause. *Id.* at 838, 868.

In the years after *Osborn*, and with increasing frequency after Congress provided for federal-question jurisdiction in 1875, courts routinely entertained suits to enforce directly a broad range of constitutional provisions, including the Contracts Clause, the Fourteenth Amendment's Due Process Clause, and the dormant Commerce Clause. *See, e.g.*, *Hays v. Port of Seattle*, 251 U.S. 233 (1920) (Due Process Clause and Contracts Clause); *Vicksburg Waterworks Co. v. Mayor & Aldermen of Vicksburg*, 185 U.S. 65 (1902) (Contracts Clause); *Chicago Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226 (1897) (Due Process Clause); *Scott v. Donald*, 165 U.S. 107 (1897) (Commerce Clause); *Allen v. Baltimore & Ohio R.R. Co.*, 114 U.S. 311 (1884) (Contracts Clause).

The direct actions for equitable relief brought to enforce the Contracts Clause are particularly noteworthy because this Court has not settled whether claims under the Contracts Clause may be brought under § 1983. *See Dennis v. Higgins*, 498 U.S. 439, 456-457 (1991) (Kennedy, J., dissenting);

Crosby v. City of Gastonia, 635 F.3d 634, 640-641 (4th Cir.) (noting issue), *cert. denied*, 132 S. Ct. 112 (2011). Nonetheless, the Court explained in *Vicksburg Waterworks* that the Contracts Clause claim was properly before it because "the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question"—without suggesting that a statutory cause of action was also necessary. 185 U.S. at 82. The Court more recently upheld a Contracts Clause claim in a direct-action posture in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), without discussing whether the claim might have been brought under § 1983.

One of the most notable of these cases was *Ex Parte Young*, 209 U.S. 123 (1908). After the Minnesota Attorney General signaled his intention to enforce a state law limiting the rates that railroads could charge, a group of railroad shareholders sued him to enjoin enforcement of that law, arguing that it violated the Commerce Clause and Due Process Clause of the Fourteenth Amendment. The Court concluded that the Eleventh Amendment does not bar suits against state officers to enjoin violations of the Constitution or federal law. *Id.* at 159-160. The Court also concluded that the federal courts had jurisdiction because the case raised "Federal questions" directly under the Constitution. *Id.* at 143-145. The Court thus viewed the Constitution—paired with the federal-question jurisdiction statute—as providing the basis of the plaintiffs' right to sue a state officer to enjoin an alleged constitutional violation. As this Court has observed, "the availability of prospective relief of the sort

awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Indeed, scholars have concluded that "the best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution and laws."[5]

Also demonstrating this principle are the numerous cases in which this Court has resolved structural constitutional claims brought against the federal government without suggesting that a statutory cause of action was necessary for those claims to be before the courts, and where there was no evident alternative forum for those claims to be heard (such as under the Administrative Procedure Act or in defense to an enforcement action). *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *South Carolina v. Baker*, 485 U.S. 505 (1988); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 & n.2 (2010) (ruling that Appointments Clause claim was properly before the courts, despite the absence of a statutory cause of action); *accord Bond*, 131 S. Ct. at 2363-2364 ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority

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[5] Charles Alan Wright et al., *Federal Practice and Procedure* § 3566, at 292 (3d ed. 2008).

that federalism defines."); *see also id.* at 2365 ("The structural principles secured by the separation of powers protect the individual as well.").

C. The Supremacy Clause As Well May Be Enforced Through Direct Equitable Actions.

Given the courts' historical willingness to entertain direct actions to enforce the Constitution, it would be surprising to learn that the Supremacy Clause, alone among the Constitution's provisions, could not be so enforced. As the Framers explained, the Supremacy Clause is fundamental to the Constitution, for if the laws of the United States "were not to be supreme," then "they would amount to nothing." Federalist No. 33 (Hamilton). The Supremacy Clause thus "flows immediately and necessarily from the institution of a federal government." *Id.*; *see also* Resp. Br. 13-15. In keeping with historical tradition, direct actions under the Supremacy Clause have played an important role in vindicating the supremacy of federal law, as *Osborn* and *Ex parte Young* illustrate.

This Court has implicitly recognized a right of action under the Supremacy Clause to enjoin preempted state law in many contexts—including cases where the preempting federal law was enacted pursuant to Congress's Spending Clause powers, and where state participation in the federal program was voluntary.[6] By routinely resolving such claims on the

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[6] *See, e.g., Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (federal Medicaid law preempts state statute imposing liens on tort settlement proceeds). In *Pharm. Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003) *("PhRMA")*, seven Justices (four in the plurality and

merits, without regard to whether a federal statute confers a right of action, this Court has established not only that federal courts have subject-matter jurisdiction over claims to enjoin preempted state law, but also that there is a right of action under the Supremacy Clause for such claims. It is particularly noteworthy that the Court entertained such Supremacy Clause claims without reference to a statutory cause of action long before *Maine v. Thiboutot*, 448 U.S. 1 (1980), established that § 1983 may be used to vindicate federal statutory—in addition to federal constitutional—rights against state interference. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Asakura v. City of Seattle*, 265 U.S. 332 (1924). That tradition continues unbroken to this day.[7]

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three in dissent) reached and resolved the merits of plaintiff's claim that the challenged state law was preempted by the federal Medicaid statute. *See id.* at 649-670 (plurality opinion) (finding on the merits that state law was not preempted); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (finding on the merits that the state law was preempted). By so doing, seven Justices implicitly concluded both that the Court had the authority to resolve the case under federal-question jurisdiction and that the plaintiff had a claim to injunctive relief under the Supremacy Clause. *See id.* at 668 (plurality opinion).

[7] *See e.g.*, *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013) (National Voter Registration Act preempts state statute requiring prospective voters to present evidence of citizenship); *Arizona v. United States*, 132 S. Ct. 2492 (2012) (Federal immigration law preempts multiple provisions of Arizona SB 1070); *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) (Federal Aviation Administration Authorization Act preempts state requirements related to the transport of tobacco products); *Ahlborn*, 547 U.S. 268 (federal Medicaid law preempts state statute imposing liens on tort

In short, "the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision—and that such an action falls within federal question jurisdiction—is well established." *Hart & Wechsler's The Federal Courts & The Federal System* 807 (Fallon et al. eds., 6th ed. 2009) (collecting cases).

This Court's decision in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is consistent with this analysis. That decision makes clear that § 1983 does not provide a home for all preemption claims (but may be used only to vindicate federal "rights"), *see id.* at 107, but it nowhere suggests that preemption claims may not be directly asserted merely because § 1983 does not provide a vehicle to do so. That the Supremacy Clause itself "does not create rights *enforceable under § 1983*," *id.* (emphasis added), means only that certain

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settlement proceeds); *PhRMA*, 538 U.S. at 649-670 (plurality opinion) (Medicaid Act did not preempt state prescription-drug rebate law); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act preempts state regulations on cigarette advertising); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (federal Burma statute preempts state statute barring state procurement from companies that do business with Burma); *United States v. Locke*, 529 U.S. 89 (2000) (various federal statutes preempt state regulations concerning, *inter alia*, the design and operation of oil tankers); *Foster v. Love*, 522 U.S. 67 (1997) (federal election statute preempts Louisiana's "open primary" statute); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (Employee Retirement Income Security Act preempts portions of state benefits law); *see also* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-400 (2004) (canvassing this Court's case law on preemption claims).

preemption claims may not be brought under § 1983, not that such claims may not be brought at all. Indeed, the dissent in *Golden State Transit*, which would have denied the award of money damages under § 1983, made that very point, explaining that denying relief under § 1983 "would not leave the company without a remedy" because "§ 1983 does not provide the exclusive relief that the federal courts have to offer," and that the plaintiffs could seek an injunction on preemption grounds. *Id.* at 119 (Kennedy, J., dissenting).[8]

While acknowledging that the federal courts have previously entertained direct actions to enforce the Constitution (including the Supremacy Clause), Petitioner, as well as some of its amici, has suggested that, where Congress has not provided a vehicle like

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[8] Section 1983 is not duplicative of the right of action for injunctive relief under the Supremacy Clause. By enacting § 1983, Congress expanded the kinds of state action that private litigants could challenge and the remedies they could seek beyond those available in suits directly under the Constitution. That § 1983 has been an important mechanism to secure constitutional rights by providing damages remedies against state and local officials does not mean that § 1983 is the only avenue through which unconstitutional state action can be challenged.

Likewise, an injunction enforcing the Supremacy Clause preserves the paramount place of federal law in our constitutional scheme without providing the full range of remedies, including damages, that might be available if Congress authorized a direct cause of action under a federal statute itself. For that reason, a direct cause of action under the Supremacy Clause does not "effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." *Douglas v. Independent Living Center of S. Cal.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, J., dissenting).

§ 1983 for such claims to be heard, the federal courts should entertain direct actions only when they are brought to prevent the threatened, imminent enforcement of an unconstitutional or preempted state law against the plaintiff. *See* Pet. Br. 40; National Governors Ass'n *et al.* Amicus Br. 25-27; Texas *et al.* Amicus Br. 14-15; U.S. Amicus Br. 18-21.[9] Those suggestions should be rejected for several reasons.

First, those arguments are inconsistent with this Court's uniform precedent. This Court has heard and sustained many direct equitable actions under the Constitution, including the Supremacy Clause, and also including preemption claims based on a federal spending statute, even when there was no evident enforcement action to which the federal claim might be raised as a defense. For example, in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), the challenged Massachusetts law barred government procurement of goods and services from companies doing business with Burma. *See id.* at 366-367. There was no "enforcement" action in which

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[9] The United States has taken the position elsewhere that the Supremacy Clause provides a direct cause of action that is not limited to asserting a defense to a state enforcement action. See, e.g., Compl., *United States v. Arizona*, 10-cv-01413 (D. Ariz. July 6, 2010) (filed by the United States as plaintiff challenging Arizona immigration law, seeking declaratory and injunctive relief and asserting "Violation of the Supremacy Clause" as its first cause of action) (*preliminary injunction aff'd in part and rev'd in part*, 132 S. Ct. 2492 (2012)); Compl., *United States v. Alabama*, 11-cv-02746 (N.D. Ala. Aug. 1, 2011) (similar, in challenge to Alabama law) (*preliminary injunction aff'd in part and rev'd in part*, 691 F.3d 1269 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013)).

the companies could raise preemption as a defense; the plaintiffs simply could no longer get government contracts. This Court held that the state law was preempted, necessarily presuming that there was a right of action under the Supremacy Clause that could be asserted directly and not merely in defense of an enforcement action. *Id.* at 367.

Similarly, in *Toll v. Moreno*, 458 U.S. 1 (1982), the Court considered a preemption challenge by a group of non-citizen Maryland residents to a University of Maryland policy that rendered the plaintiffs ineligible for in-state tuition rates based on their immigration classification. As in *Crosby*, the plaintiffs were not subject to an enforcement action, or a state regulation, forbidding them from certain primary conduct. Instead, they were simply denied an opportunity to apply for in-state tuition rates. The Court nonetheless reached the merits of the claim, and found that "insofar as it bars domiciled G-4 aliens (and their dependents) from acquiring in-state status, the University's policy violates the Supremacy Clause." *Id.* at 17. *See also Inter Tribal Council*, 133 S. Ct. 2247 (resolving National Voter Registration Act-based preemption claim that was raised affirmatively); *PhRMA*, 538 U.S. at 649-670 (plurality opinion); *id.* at 684 (O'Connor, J., concurring in part and dissenting in part) (seven Justices resolving Medicaid-based preemption claim that was raised affirmatively); *supra* pp. 11-12 (noting other examples of direct constitutional claims being entertained where they could not have been raised as defenses to enforcement actions).

Second, a rule barring many affirmative preemption claims, while allowing claims based on a

violation of constitutional *rights* to go forward in federal court under § 1983, would be extraordinarily inefficient and would undermine the effective vindication of federal law. Litigants frequently pursue both preemption theories and other constitutional claims. Cases before this Court teem with examples: businesses commonly pursue both preemption claims and claims under the Commerce, Contracts, or Due Process Clauses; immigrants pursue both preemption claims and claims under the Equal Protection Clause and First Amendment; racial minorities pursue both statutory claims and claims under the Fourteenth and Fifteenth Amendments. Very often, courts turn to the preemption claim first in order to avoid reaching difficult constitutional questions. *See, e.g.*, *Crosby*, 530 U.S. 363 (holding state procurement statute preempted by federal Burma statute, and thereby avoiding dormant Foreign Commerce Clause claim); *Toll*, 458 U.S. at 9-10 (holding Maryland policy preempted, and thereby avoiding Due Process and Equal Protection claims); *Hines*, 312 U.S. 52 (holding Pennsylvania registration law for non-citizens preempted by federal legislation enacted while the case was before the Supreme Court, and thus avoiding Equal Protection claim).

If litigants could not pursue both preemption claims (directly) and other constitutional claims (under § 1983) in a single action for equitable relief, then, in cases where a state forum was available for their preemption claims, they would be forced either to divide their federal claims between federal and state courts (which could well be barred by rules against splitting causes of action) or to forgo the federal forum for their § 1983 claims (which would be

contrary to the strong congressional policy in favor of affording a federal forum for such claims). *See, e.g.*, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496 (1982). The far more efficient and sensible rule, as well as the one more consistent with this Court's decisions, is to allow equitable claims based on all provisions of the Constitution, including the Supremacy Clause, to be entertained in affirmative litigation through an action directly under the Constitution.

The rule proposed by Petitioner and its amici would have even more damaging results where there is no state forum for litigants' preemption claims. Many Supremacy Clause claims cannot be raised defensively at all, because there is no enforcement action in which they can be raised. In such circumstances, unless a state has decided to provide an alternative forum, an affirmative direct action under the Constitution is the only way in which the supremacy of federal law could be established. *See* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 406 (2004) (discussing such claims). And, even when a litigant might be able to assert his Supremacy Clause claim in state court, his ability to establish the supremacy of federal law should not be dependent on the venues that state law happens to make available.

The history of the civil rights movement in this country well illustrates the need to enforce federal rights in the federal courts, without reliance on legislative grace or the vagaries of state law. Had § 1983 never been enacted, it could hardly be the case that state laws providing for segregated schools, white primaries, and restrictions on immigrants could have gone unchallenged. Plaintiffs could

challenge, and did challenge, such unconstitutional state laws directly under the Constitution, including the Supremacy Clause. And nothing in the Supremacy Clause suggests that it may not also be used directly to challenge state laws because they conflict with a federal law, and not (or not just) the federal Constitution. The Supremacy Clause itself provides that both the Constitution "*and* the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land." U.S. Const. art. VI (emphasis added).

Finally, nothing in the Supremacy Clause or this Court's precedent indicates that statutes enacted pursuant to Congress's Spending Clause power should be treated any differently than statutes enacted pursuant to other sources of congressional power, *i.e.*, that direct causes of action may not be brought to vindicate the federal structural interest in the supremacy of Spending Clause statutes. Indeed, numerous Spending Clause statutes—including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act—are critical in preventing discrimination and protecting civil liberties, and many others—such as Medicaid and the Supplemental Nutrition Assistance Program (previously called the Food Stamp Program)—provide a critical safety net on which low-income individuals and persons with disabilities rely for survival.

II. PRECLUDING DIRECT RIGHTS OF ACTION UNDER THE SUPREMACY CLAUSE WILL HAVE BROAD AND HARMFUL CONSEQUENCES FOR MAINTAINING THE SUPREMACY OF FEDERAL LAW.

An action under the Supremacy Clause provides an important—and sometimes the only—avenue to vindicate the supremacy of federal law. Barring a right of action under the Supremacy Clause could effectively foreclose this critical avenue for persons, especially racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals, who depend on federal law and who would otherwise be subject to invalid state and local laws.

A. Racial and Ethnic Minorities, Immigrants, Persons With Disabilities, And Low-Income Individuals Continue To Depend On Direct Actions Under The Supremacy Clause To Challenge Invalid State And Local Laws.

Racial and ethnic minorities, immigrants, persons with disabilities, and low-income individuals continue to rely directly on the Supremacy Clause to challenge invalid state and local laws in many important areas, including immigration, fair housing, public assistance, and health care. Many of those cases have involved legislation enacted under Congress's Spending Clause power, and the courts have routinely adjudicated and sometimes invalidated state laws that conflicted with the federal legislation.

For example, plaintiffs in recent years have used the Supremacy Clause to challenge the increasing number of state laws that seek to restrict immigrants' rights, including immigrants' employment opportunities. In *Chamber of Commerce v. Edmondson*, 594 F.3d 742 (10th Cir. 2010), plaintiffs claimed that provisions of the Oklahoma Taxpayer and Citizen Protection Act of 2007, which created new employee verification rules and imposed sanctions on employers that allegedly hire undocumented immigrants, conflicted with federal immigration law, which sets forth a comprehensive scheme prohibiting the employment of such individuals. The Tenth Circuit, which upheld in part a preliminary injunction against enforcement of the state law, explained that a "party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.* at 756 n.13 (internal quotation marks omitted); *see also Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (adjudicating preemption challenge to Arizona law providing for the revocation or suspension of licenses in certain circumstances when state employers knowingly hire undocumented immigrants, but finding no preemption).

Numerous other courts similarly have addressed preemption challenges, under the Supremacy Clause, to state and local laws that affect immigrants' access to housing or otherwise target immigrant communities. *See, e.g., Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1876 (Apr. 21, 2014) (sustaining pastor's preemption and due process challenges to state statute criminalizing provision of assistance to

unauthorized immigrants); *Lozano v. City of Hazleton*, 724 F.3d 297, 313 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1491 (Mar. 3, 2014) (finding preemption of municipal housing and employment regulations relating to immigrants); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (en banc), *cert. denied*, 134 S. Ct. 1491 (Mar. 3, 2014) (finding municipal housing regulations relating to immigrants preempted); *United States v. South Carolina*, 720 F.3d 518, 524-26 (4th Cir. 2013) (addressing separate preemption challenges to South Carolina immigration laws by United States and private parties, finding private plaintiffs had implied private right of action, and upholding preliminary injunction); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1261-1262 (11th Cir. 2012) (finding implied private right of action to challenge Georgia's Illegal Immigration and Enforcement Act of 2011 under Supremacy Clause and upholding preliminary injunction in part); *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997) (finding preempted most provisions of a state law that, *inter alia*, restricted immigrants' access to health care, social services, and education).

Low-income individuals have likewise invoked the Supremacy Clause to ensure compliance with federal housing laws. In *Kemp v. Chicago Housing Authority*, No. 10-cv-3347, 2010 WL 2927417 (N.D. Ill. July 21, 2010), a single mother of two argued that municipal rules unlawfully allowed the Chicago Housing Authority to terminate her public housing assistance in circumstances other than those specified and limited by the United States Housing Act of 1937. Kemp sought to enjoin the local law as

preempted under the Supremacy Clause. Although the court ultimately did not grant relief because of the Anti-Injunction Act, it concluded that the Supremacy Clause "create[s] rights enforceable in equity proceedings in federal court," and that it could therefore exercise jurisdiction over Kemp's preemption claim. *Id.* at *3 (internal quotation marks omitted).

Persons receiving public assistance have also invoked the Supremacy Clause to challenge state laws that terminate medical or other benefits in contravention of federal law. For example, in *Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229 (5th Cir. 2005), the court invalidated under the Supremacy Clause state regulations that expanded the circumstances, beyond those allowed by federal law, under which Medicaid benefits could be cut off for low-income adults receiving assistance under the federal Temporary Assistance to Needy Families program.

And, in *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006), the Eighth Circuit relied directly on the Supremacy Clause to preliminarily enjoin a Missouri regulation that limited Medicaid coverage of durable medical equipment, such as wheelchair batteries, catheters, and suction pumps for respiration, to certain populations, making most Medicaid recipients with disabilities in Missouri ineligible to receive such items even if medically necessary. *Id.* at 511. The court found that the regulation conflicted with Medicaid's requirements and goals, including its goals with respect to community access for persons with disabilities, and therefore was likely preempted under the Supremacy

Clause. *Id.* at 513 (holding that plaintiffs had "established a likelihood of success on the merits of their preemption claim" for obtaining a preliminary injunction).

Direct actions under the Supremacy Clause, therefore, remain critically important to racial and ethnic minorities, immigrants, persons with disabilities, and low-income persons in our society who rely on them for vindication of federal law. The availability of that direct action ensures that state and local governments cannot undermine federal law by enacting statutes and regulations that deviate from federal requirements but would, absent a Supremacy Clause action, be effectively insulated from judicial review.

B. Precluding Rights Of Action Under The Supremacy Clause Would Undermine Important Federal Interests.

Precluding a right of action under the Supremacy Clause would leave important rights and interests effectively unprotected. Not only would the rights of individual litigants seeking to invalidate unconstitutional state laws be harmed, but important federal supremacy interests could go unprotected as well.

First, precluding rights of action under the Supremacy Clause would leave few, if any, effective remedies to force state compliance with many federal laws that are intended to benefit racial and ethnic minorities, immigrants, persons with disabilities, and low-income persons in our society. In the context of laws enacted under Congress's Spending Clause

power, the termination of federal funding may sometimes be theoretically available to remedy the State's failure to comply with its obligations under the Medicaid Act or other Spending Clause laws, *see PhRMA*, 538 U.S. at 675 (Scalia, J., concurring in the judgment), but that remedy is so rare and drastic as to be effectively unavailable as a meaningful enforcement tool. As commentators have explained, both political considerations and procedural hurdles make withdrawal of federal funding an illusory remedy. *See, e.g.*, Bradford C. Mank, *Suing Under § 1983: The Future After* Gonzaga University *v.* Doe, 39 Hous. L. Rev. 1417, 1431-1432 (2003) ("[A]s a practical matter, federal agencies rarely invoke the draconian remedy of terminating funding to a state found to have violated the [federal] conditions because there are often lengthy procedural hurdles that allow a state to challenge any proposed termination of funding, and members of Congress from that state will usually oppose termination of funding."); Jane Perkins, *Medicaid: Past Successes and Future Challenges*, 12 Health Matrix 7, 32 (2002) ("[T]he Medicaid Act provides for the Federal Medicaid oversight agency to withdraw federal funding if a State is not complying with the approved State Medicaid plan; however, this is a harsh remedy that has rarely, if ever, been followed through to its conclusion."); Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 292-93 (1996) ("[O]ften the agency's only enforcement mechanism is a cutoff of federal funds for the program[,] [which] is rarely, if ever, invoked.").

Moreover, termination of federal funding would, in many circumstances, be counterproductive and contrary to Congress's intent that the funding program be implemented to provide a wide benefit. Indeed, persons who receive crucial benefits and services from federal programs usually do not want federal funding to be terminated. Terminating federal funding would not protect the interests of those injured by the State's noncompliance with federal law; rather, it would harm the very people Congress intended to benefit. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704-705 (1979) (explaining that "termination of federal financial support for institutions engaged in discriminatory practices is severe" and "may not provide an appropriate means of accomplishing" the purposes of the statute); *see also* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1227-1228 (1999) ("[T]he sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds will injure the very clients that the federal government wishes to serve.").

The more effective way to vindicate the objectives of federal law is to allow private parties to continue to play an important role in enforcing the supremacy of federal statutes. As the United States previously argued, "those programs in which the drastic measure of withholding all or a major portion of federal funding is the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions in appropriate circumstances." *See* U.S. Cert. Amicus

Br., *Douglas v. Independent Living Ctr. of S. Cal.*, No. 09-958, at 19. In such circumstances, an injunction would force a State to comply with the federal provision at issue without harming the intended beneficiaries of the federal pro-gram.

Nor would it be appropriate to force individuals who depend on federal law to rely exclusively on the federal government to bring affirmative litigation to enforce compliance with the Supremacy Clause. Private rights of action are necessary because the government lacks the resources to police preemption disputes between States and private parties. *See* Sloss, *supra*, at 404. Private rights of action "increase the social resources devoted to law enforcement, thus complementing government enforcement efforts." Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 108 (2005); *see also Ahlborn*, 547 U.S. at 291.

The recent cases challenging state and local immigration laws illustrate the importance of private rights of action. A wave of state and local immigration legislation began in 2006 and continued through approximately 2011. Private plaintiffs—individual immigrants, community organizations, and businesses—began challenging the laws immediately on preemption and other grounds. *See, e.g.*, *Lozano* (case initiated in 2006); *Whiting* (case initiated in 2007). The federal government largely agreed with the private plaintiffs' claims that the laws were preempted, and generally filed appellate amicus briefs (and a merits amicus brief in the Supreme Court) in support of the cases that reached

those levels. *See, e.g.*, U.S. Cert. Amicus Br., *Villas at Parkside Partners* (5th Cir. No. 10-10751); U.S. Amicus Br., *Whiting* (No. 09-115). But the United States did not begin filing challenges on its own behalf until 2010, and then only against a minority of the preempted laws, and only in instances where private plaintiffs had already filed suit.[10] Absent a right of action under the Supremacy Clause, there could well have been no meaningful remedy at all to invalidate many state and local laws that the courts found to be unconstitutional.

A private right of action under the Supremacy Clause serves other important values as well. The Supremacy Clause supports the structural guarantee of federalism—namely, that federal law will remain paramount. And that interest can only be effectively vindicated by ensuring that preempted state laws are invalidated—a goal that, for the reasons described above, can best be achieved through a private right of action.[11] In addition, by allowing robust enforcement

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[10] The United States filed actions challenging state laws enacted in Arizona, South Carolina, Utah, and Alabama. Unlike private plaintiffs, the United States did not directly challenge any local immigration laws, state laws in Georgia and Indiana, or Arizona's immigrant employment law.

[11] For example, preemption claims in immigration and other areas of law have been critical to preserving the federal government's paramount role in foreign policy. *See, e.g.*, *Hines*, 312 U.S. at 63 ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *id.* at 66-67; *see also Toll*, 458 U.S. 1, 10-13 (1982).

for preemption claims, a private right of action fosters uniformity and predictability in the application of both federal and state law. In order to realize the Constitution's fundamental promise that federal law will remain paramount over invalid state and local laws, it is essential for this Court to continue—as it has done for nearly two hundred years—to allow litigants to bring preemption challenges directly under the Supremacy Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; AND LIVING INDEPENDENTLY FOR EVERYONE, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AND THE FEDERATION OF AMERICAN HOSPITALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION AND THE FEDERATION OF AMERICAN HOSPITALS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST[1]

The American Hospital Association and the Federation of American Hospitals respectfully submit this brief as *amici curiae*.

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amici curiae*, their members, or counsel made a monetary contribution intended to fund the preparation of submission of this brief. All parties have filed blanket amicus consent letters.

The American Hospital Association (AHA) represents nearly 5,000 hospitals, health systems, and other health care organizations, along with 43,000 individual members. AHA members are committed to improving the health of the communities they serve, and to helping ensure that care is available to, and affordable for, all Americans. As part of its mission, the AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health policy.

The Federation of American Hospitals is the national representative of investor-owned or managed community hospitals and health systems throughout the United States. Dedicated to a market-based philosophy, the FAH provides representation and advocacy on behalf of its members to Congress, the Executive Branch, the judiciary, media, academia, accrediting organizations and the public.

AHA and FAH members play a vital role in ensuring access to health services for the nearly 65 million Americans covered by Medicaid. That program is today the Nation's single most important health care safety net. It covers more Americans than Medicare or any private insurer. And it is a critical source of funding for the hospitals and health care systems that serve the country's most vulnerable populations.

This case concerns the right of healthcare providers, including AHA and FAH members, to challenge state regulations preempted by the substantive provisions of the Medicaid Act. Because such suits are crucial to preserving access to the level of care Congress intended Medicaid to provide, *amici* respectfully urge this Court to affirm the judgment below.

SUMMARY OF ARGUMENT

A. Congress enacted Medicaid as a cooperative federal–state program to provide medical care for the neediest Americans. To realize the program's objectives, Congress placed conditions on participating states. One such condition, set out in Section 30(A) of the Medicaid Act, requires states to reimburse healthcare providers at rates sufficient to ensure that Medicaid beneficiaries enjoy the same access to health care as the general population.

Section 30(A)'s promise of equal access is central to Medicaid's purpose—yet states have repeatedly cut reimbursement rates to levels far below providers' actual costs, without taking into account how that harms providers or constrains the availability of health care for the neediest Americans. In 2012, the cost of providing care to Medicaid beneficiaries exceeded reimbursements by *$13.7 billion*, up from $11.3 billion in 2009. This persistent gap threatens the availability of quality medical care for tens of millions of people. After all, providers can only endure for so long if they suffer a loss with each patient they treat.

Without recourse to the courts to enforce the conditions Congress set in place, hospitals and other providers will continue to bear losses that, for some, are unsustainable.

B. Reimbursement rates set without regard to the availability or cost of care violate Section 30(A). Like any other state regulation in conflict with federal law, they are subject to preemption under the Supremacy Clause.

For over a hundred years, this Court has recognized that sovereign immunity does not extend to

state officials enforcing state laws in derogation of federal authority. *Ex parte Young*, 209 U.S. 123, 159 (1908). In that time, this Court has decided dozens of cases seeking injunctive and declaratory relief from state regulations on preemption grounds.

Provider suits challenging state Medicaid reimbursement rates fit squarely into this mold. They advance congressional intent by enforcing the conditions Congress imposed on state participation, without asserting any private entitlement. And because courts must defer to permissible agency determinations of compliance with the Medicaid Act, provider suits pose no obstacle to the cooperative process set in place by the statute. The decision below should be affirmed.

ARGUMENT

I. Section 30(A) Imposes Important Substantive Limitations On States' Authority To Set Reimbursement Rates.

1. Medicaid is a critical source of health coverage nationwide. The program provides care to 64.9 million Americans—one-fifth of the population. U.S. Dep't of Health & Human Svcs., *2014 CMS Statistics*, tbl. I.16.[2] Along with its companion program, CHIP, Medicaid covers more than one in three of the nation's children. Robin Rudowitz, *et al.*, *Children's Health Coverage: Medicaid, CHIP and the ACA*, Kaiser Comm'n on Medicaid and the Uninsured,

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[2] *Available at* http://goo.gl/7qL19Z. Proportion based on U.S. Census Bureau population estimates, *available at* http://goo.gl/fldA45.

Mar. 2014.[3] In 2010, Medicaid paid for the health care costs associated with 48 percent of all births in the United States. Anne Rossier Markus, *et al.*, *Medicaid Covered Births, 2008 Through 2010, in the Context of Implementation of Health Reform*, 23 Women's Health Iss. e273, e276 (2013).[4] And the program is all the more important during economic downturns, when enrollments surge. *See* Katherine Young, *et al.*, *Medicaid Spending Growth in the Great Recession and its Aftermath, FY 2007-2012*, Kaiser Comm'n on Medicaid and the Uninsured (July 2014).[5]

Every State participates in Medicaid, and each State has an agency that administers the program. Providers who treat Medicaid beneficiaries are reimbursed directly by state administrators. States recoup a fixed percentage of those costs in matching funds from the federal government. 42 U.S.C. § 1396b; 79 Fed. Reg. 3387 (Dec. 13, 2013). Federal matching funds and related incentives account for an average of 59.1 percent of state Medicaid spending. Pew Charitable Trusts & MacArthur Found., *State Health Care Spending on Medicaid*, 2 (July 2014).[6] That makes Medicaid the largest source of federal revenue flowing to the States. *See* Nat'l Ass'n of State Budget Officers, *State Expenditure Report* 11 (Nov. 2014).[7]

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[3] *Available at* http://goo.gl/W7cBg4.

[4] *Available at* http://goo.gl/rEZJfl.

[5] *Available at* http://goo.gl/Vi2XAo.

[6] *Available at* http://goo.gl/4hePOF.

[7] *Available at* http://goo.gl/TYL6Bf.

2. To qualify for federal matching funds, States must prepare a "plan for medical assistance" that conforms to certain statutory criteria. The plan and any subsequent amendments must be approved by the Centers for Medicare & Medicaid Services (CMS), the agency that oversees the program. 42 U.S.C. § 1316(a). Although States enjoy broad flexibility in designing a Medicaid plan, that flexibility has limits. *See Alexander* v. *Choate*, 469 U.S. 287, 303 (1985) (noting States' discretion to define coverage "as long as" plan conforms to the statute's substantive requirements).

Among other things, Section 30(A) of the Medicaid Act requires that every State plan

> provide such methods and procedures relating to the utilization of, and the payment for, care and services * * * as may be necessary * * * *to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population* in the geographic area[.]

42 U.S.C. § 1396a(a)(30)(A) (emphasis added). The applicable regulations clarify that Section 30(A) requires that a state "agency's payments * * * be sufficient to enlist enough providers * * * ." 42 C.F.R. § 447.204.

Congress added Section 30(A) to the Medicaid Act in 1989. The provision codified an existing regulation that was "rarely enforced," leaving hospitals and other providers with "wholly inadequate reimburse-

ments." 135 Cong. Rec. S1643, S1661 (Feb. 23, 1989) (Stmt. of Sen. Biden); see Pub. L. 101-239, § 6402(a).

3. In spite of Congress' express intent to ensure adequate reimbursement, states have continued to slash Medicaid reimbursement rates or hold them at artificially low levels. Indeed, many states reimburse providers so little for treating Medicaid patients that the providers suffer a substantial loss with every single Medicaid patient they treat. The consequence is exactly what Congress wanted to avoid: Providers' ability to provide high quality care—and in some cases their financial viability—are jeopardized, and so in turn is the availability of quality healthcare for many millions of Americans.

a. In 2012, the most recent year for which data are available, American hospitals treated 11.2 million Medicaid beneficiaries. *See 2014 CMS Statistics*, *supra*, at table IV.1. For every dollar they spent on those patients, hospitals were reimbursed just 89 cents. American Hosp. Ass'n, *Trendwatch Chartbook 2014*, tbl. 4.4.[8] That figure amounts to an overall payment shortfall of $13.7 billion, up from $11.3 billion in 2009. *See id.*, tbl. 4.5. And it comes on top of $45.9 billion of uncompensated medical care hospitals provided to patients that year alone, up from $39.1 billion in 2009.

Although CMS is authorized to withhold federal funding from states that fail to comply with their approved plans, 42 U.S.C. § 1396c, that disciplinary mechanism has not stemmed the trend of below-cost reimbursement rates. In 2012, the year this Court

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[8] *Available at* http://goo.gl/3Lsttf.

last considered the issue presented here, thirteen states cut Medicaid spending to balance their budgets. Matthew Fleming and Phil Galewitz, *13 States Cut Medicaid to Balance Budgets*, Kaiser Health News, July 24, 2012.[9] Five of those states rolled back reimbursements to hospitals, ranging from a $150 million reduction in California to a 5.6 percent cut in Florida. *See id.*

Nor was that a one-year aberration. In 2013, another five states cut back rates for outpatient hospital care and thirty-eight states cut reimbursements for inpatient care. Kaiser Fam. Found. & Nat'l Ass'n of Med. Dirs., *Medicaid in an Era of Health & Delivery System Reform* 34-36 (Oct. 2014).[10] And in 2014, seven states cut back outpatient reimbursements and thirty states cut back inpatient reimbursements. *Id.*

States also contribute to providers' financial instability by failing to account for the ever-increasing costs of providing medical care. To take just one particularly egregious example: Pennsylvania last updated its outpatient reimbursement rates in *1991*, *see* Steve Twedt, *Medicaid Reimbursement Woes Persist*, Pittsb'g Post Gaz., Oct 21, 2013[11]—a 23-year period during which the average cost of medical care has more than doubled, *see Forecast Chart, US Medical Cost Inflation*.[12]

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[9] *Available at* http://goo.gl/JT1lNN.

[10] *Available at* http://goo.gl/jP3Mcq.

[11] *Available at* http://goo.gl/oYkyWT.

[12] *Available at* http://goo.gl/TSfgrc. Nor is Pennsylvania alone. Connecticut has refused to adjust hospital rates for inflation

b. These data underscore a basic, and brutal, truth: States are balancing their budgets on the backs of the providers that care for the neediest Americans. That is dangerous not just to providers but to patients—the focus of Congress', and hospitals', concern. In many cases, the hospitals that treat the largest proportion of Medicaid beneficiaries are the very hospitals that can least afford to take a loss, patient after patient. That puts beneficiaries' access to medical care at risk.

Nationwide, nearly 26 percent of hospitals endure negative operating margins. *See Trendwatch Chartbook 2014*, *supra*, at tbl. 4.1. The hospitals that treat the most Medicaid patients also tend to face the most significant financial challenges. In 2012, hospitals in the top quartile for the number of Medicaid patients they treated had operating margins 18 percent lower than their peer hospitals.[13] And these are the very hospitals that are being persistently underpaid by the states: From 2000 to 2012, state cuts to Medicaid reimbursement left hospitals treating Medicaid patients with nearly $100 billion in shortfalls. *See id.* at tbl. 4.5. These shortfalls force hospitals to

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since 2002. *See* Letter from CMS Director Cindy Mann to Commissioner Roderick L. Bremby, Conn. Dep't of Soc. Svcs. (Mar. 18, 2014). And in Arizona, the State cut hospital payment rates by 5 percent in 2011 and froze rates through 2013. It projected that the changes would more than double the number of hospitals taking in *only 50-60 cents for each dollar they spend* to provide care. Milliman, Inc., *Arizona Medicaid Access to Hospital Care—2013 Evaluation* 3 (June 2012), *available at* http://goo.gl/aQGwsq.

[13] Analysis of AHA Annual Survey Data.

forego capital investments, maintenance, and improvements to services. And in some cases they jeopardize providers' ability to continue treating patients at all.

Providers' preemption challenges to state plans that violate Section 30(A) are therefore critical to preserving the integrity of the Medicaid system and the availability of quality, affordable health care for all Americans.

II. The Supremacy Clause Provides A Cause Of Action To Enjoin State Violations Of Section 30(A).

Providers should be able to continue bringing these important lawsuits. This Court has long recognized the power of federal courts to hear cases, like this one, that "seek injunctive relief from state regulation, on the ground that [it] is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail." *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Indeed, as the United States concedes, this Court has decided "dozens" of preemption claims on the merits without requiring an express or implied statutory cause of action. *See* U.S. Br. 16 (collecting cases). Such claims "give[ ] life to the Supremacy Clause." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985). There is no reason to change course now.

A. Preemption Suits Enforce The Federal Order, Not Individual Rights.

Petitioners frame this case as an effort by Respondents to vindicate a private right. It is not. The supremacy of federal law, like the separation of powers, is a bedrock of our constitutional order; it

would make little sense to cast enforcement of either principle in terms of private rights. *See INS* v. *Chadha*, 462 U.S. 919 (1983); *Golden State Transit* v. *City of Los Angeles*, 493 U.S. 103, 117 (1989) (Kennedy, J., dissenting) ("Pre-emption concerns the federal structure of the Nation rather than the securing of rights, privileges and immunities to individuals."). *Cf. Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979) (distinguishing between suits brought to vindicate rights "secured by the Constitution" and suits alleging "incompatibility between federal and state statutes and regulations" under the Supremacy Clause).

1. The central question in preemption challenges is whether Congress intended to displace inconsistent state regulation. *See, e.g., Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370-373 (2008); *Pacific Gas & Elec. Co.* v. *State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983); *Ray* v. *Atlantic Richfield*, 435 U.S. 151, 157-158 (1978). Contrary to Petitioners' view, that analysis has never depended on whether the state regulation at issue affects the plaintiff's "primary conduct" or whether the suit amounts to an "anticipatory defense" to an enforcement action. *See* Pet. Br. 40-44. Rather, it is "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict." *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

The plaintiffs in this case alleged, and the courts below found, just such a conflict between Idaho's

outdated reimbursement rates and Section 30(A).[14] Under this Court's precedent, that conflict rendered the rate regulations invalid. *See, e.g.*, *Arkansas Dep't of Health & Human Svcs.* v. *Ahlborn*, 547 U.S. 268, 272 (2006) (invalidating state attachment provision as inconsistent with the Medicaid Act); *Carleson* v. *Remillard*, 406 U.S. 598, 604 (1972) (invalidating state criteria for benefits eligibility at variance from federal standard); *Townsend* v. *Shank*, 404 U.S. 282, 285 (1971) (same); *King* v. *Smith*, 392 U.S. 309, 333 (1968) (same). And because "[t]he state has no power to impart to [an official] any immunity from responsibility to the supreme authority of the United States," the district court properly enjoined their enforcement. *Ex parte Young*, 209 U.S. at 159.

2. This Court's consistent focus on the compatibility between state and federal law explains why affirming Medicaid providers' rights to bring suit under the Supremacy Clause would not "effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence." Pet. Br. 19 (quoting *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting)).

First, whether a state regulation frustrates some congressional purpose is a question distinct from whether Congress intended to allow suits for damages or other individualized relief. *Cf. Nat'l Pvt. Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 592 (1995) (Kennedy, J., concurring) (distin-

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[14] Because this Court declined to grant review on the merits, *see* 135 S. Ct. 44 (2014) (Mem.), Petitioners have not challenged that conclusion here.

guishing between suits asserting a federal statute's preemptive force and those asserting private rights). Second, even if the inquiries overlapped, that would not render the implied-right-of-action jurisprudence a dead letter because plaintiffs can bring suits under the Supremacy Clause only when they seek equitable relief from *state law* or actions that have the force of law. Plaintiffs seeking to vindicate federal rights as against private defendants, rather than to preempt contrary state law or regulation, would still have to show that Congress provided them with a right of action. The same goes for plaintiffs bringing run-of-the-mine constitutional tort claims for damages against individuals acting under color of law.

The obvious difference between invalidating a law or regulation as preempted and vindicating a private right also vitiates Petitioners' claim that cases like *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), and *Astra USA, Inc.* v. *Santa Clara Cnty., Calif.*, 131 S. Ct. 1342 (2011), foreclose Respondents' suit. *See* Pet. Br. 24-27. In both cases, this Court observed that a party could sue to obtain some benefit under a statute only if Congress had intended to provide a private right of action. But pure preemption challenges are not demands for particular rates or other benefits; they do no more than enforce the "federal structure of the Nation." *Golden State Transit*, 493 U.S. at 117 (Kennedy, J., dissenting).

B. Petitioners' Attempts To Recharacterize This Court's Preemption Cases Are Unpersuasive.

Preemption claims, in short, do not vindicate—and therefore do not require—an individual right. That is why, as the United States is forced to concede, this

Court has decided "dozens" of preemption claims on the merits without identifying an express or implied statutory cause of action. U.S. Br. 16.

Petitioners and their *amici* proffer a grab bag of explanations to differentiate this mountain of adverse precedent from the case at hand. They say the Court allows affirmative preemption claims only when the plaintiff can "assert an independent federal right that is impaired by state regulation," Pet. Br. 43, or when the plaintiff faces a "burden" because of state law, U.S. Br. 32, or when the state law regulates the plaintiff's "primary conduct," U.S. Br. 31. None of these descriptions successfully distinguishes the past cases from this one.

1. Petitioners argue that this Court has allowed affirmative preemption claims only when the plaintiff can "assert an independent federal right that is impaired by state regulation." Pet. Br. 43. That argument defeats itself. It defines the concept of a "right" so broadly that, if accepted, it would only prove that *the Respondent providers here*, too, have an "independent federal right."

For nearly fifty years, this Court has recognized that preemption claims do not implicate individual rights secured by the constitution. *Swift & Co.* v. *Wickham*, 382 U.S. 111, 120 (1965); *accord Chapman*, 441 U.S. at 615. In other words, the "right" to be free from preempted state regulation is just a rhetorical consequence of "the Supremacy Clause's separate protection of the federal structure from the division of power in the constitutional system." *Golden State Transit*, 493 U.S. at 118 (Kennedy, J., dissenting). Whether Congress intended to displace state law has nothing to do with whether Congress

has conferred "private rights to an[] identifiable class." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002) (internal quotation marks omitted); *cf. Dennis* v. *Higgins*, 498 U.S. at 439, 462-463 (1991) (Kennedy, J., concurring) (the "ability to invoke the Commerce Clause against a State * * * is not equivalent to finding a secured right under § 1983").

To say that this Court's preemption cases have relied on federal "rights" makes sense only if that word is defined so loosely as to include an entitlement to be free from state law that conflicts with federal law. And if that definition holds true, then Respondents here must also have a federal right: the right to be free from state Medicaid regulations that violate Section 30(A).

2. The United States concedes that several of this Court's recent preemption cases did not involve anything that could be considered a "right" for Section 1983 or implied-right-of-action purposes. U.S. Br. 16-17 & n.6. Having parted with Petitioners on this point, the United States tries to distinguish the cases on the grounds that they "involved claims for relief from *state-law requirements or other burdens* that were allegedly inconsistent with federal law." U.S. Br. 32 (emphasis added). But again, that is no distinction at all. Respondents contend that the State's regulations burden them by setting Medicaid reimbursement rates in a manner that fails to account for the cost and availability of care. The United States' characterization sweeps in this case.

Perhaps recognizing as much, the United States next urges that preemption claims lie only where the state-law requirements burden the plaintiffs' "primary conduct." *Id.* at 31; 18-19. But that limitation is

plucked from thin air. The "primary conduct" limitation is nowhere to be found in this Court's opinions, and the United States does not attempt to argue otherwise.

In sum, Petitioners and their *amici* cannot wish away this Court's preemption cases. The doctrinally significant attribute these cases share is that they challenged state regulation on the grounds that it was preempted by federal law. *See, e.g.*, *Perez*, 402 U.S. at 644; *Rowe*, 552 U.S. at 370-373; *Pacific Gas & Elec. Co.*, 461 U.S. at 203-204; *Atlantic Richfield*, 435 U.S. at 157-158. Respondents should be allowed to do the same here.

C. Medicaid Preemption Claims Further Congress's Expressed Intent.

Petitioners insist that, even if the Supremacy Clause authorizes preemption claims in some cases, it does not authorize claims that state law is preempted by Section 30(A). Not so. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause," *Perez*, 402 U.S. at 652, and state law that conflicts with Section 30(A) is no different.

1. Petitioners argue that Section 30(A) preemption suits are barred under this Court's Spending Clause jurisprudence because they impermissibly "impose[ ] on [S]tates requirements they did not bargain for." Pet. Br. 31. They do no such thing. This is not a case where, for example, a state is being asked to pay for some benefit not specifically identified in the Spending Clause statute at issue. *E.g., Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006). Quite the contrary: Section 30(A) explicitly tells states the criteria they must meet when they set

reimbursement rates. Private suits do no more than hold states to the terms of their agreement.

2. Petitioners and their *amici* also contend that judicial scrutiny of states' compliance with Section 30(A) disrupts federal-state cooperation, inhibits states' ability to plan their Medicaid expenditures, and lacks administrable standards. Those objections are misguided.

a. Medicaid preemption suits do not interfere with CMS's ability to exercise its discretion in reviewing and approving state Medicaid plans and amendments. As a practical matter, states that make lawful changes to their reimbursement rates will normally enjoy a decisive advantage in preemption litigation because courts must defer to CMS's reasonable determinations. *E.g.*, *Douglas* v. *Independent Living Ctr. of So. Cal., Inc.*, 132 S. Ct. 1204, 1210-11 (2012); *see Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). Where a State violates the statute or the terms of an approved plan and CMS fails to act, or where CMS makes a determination that is not entitled to deference, a ruling that a state plan or amendment violates Section 30(A) is entirely consistent with the statutory scheme.

While no one doubts that CMS is "comparatively expert in the statute's subject matter," *Douglas*, 132 S. Ct. at 1210, CMS has no more authority to ignore Congress' intent—whether by approving an amendment that flouts Section 30(A) or by staying on the sidelines—than a state does. That is why courts owe deference only to "permissible constructions" of an ambiguous statute and, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as

well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. However delicate the balance states may wish to strike with CMS, they must respect the bounds that Congress set.

The United States advances the related argument that preemption suits would complicate CMS's oversight role by leading to development of divergent standards in courts across the country. U.S. Br. 24-25. That is equally unpersuasive. CMS itself has "considered and declined to propose setting a single uniform Federal standard for reviewing substantive compliance with [Section 30(A)'s] access requirements because [it] believe[s] that determination of such compliance is very fact-specific and data-specific, taking into consideration local circumstances." 76 Fed. Reg. 26342, 26349 (May 6, 2011); *see* U.S. Br. 13-14 & n.5. So the possibility that the circuits will develop different standards for assessing compliance with Section 30(A) does not itself frustrate any CMS policy of nationwide uniformity. And to the extent CMS interprets some portion of the statute in a manner that requires uniformity, that interpretation will control where it is entitled to deference.

b. California claims, as *amicus*, that preemption suits destabilize states' ability to plan and budget. It argues that its "inability to predict how courts * * * would misinterpret § 30(A) has cost its Medicaid program" an average of 0.27 percent of its Medicaid budget per year since 2008. Calif. Br. 10-11, 14. But its supposedly illustrative examples offer no support for its argument.

First, California complains that CMS delayed and then declined to give full retroactive effect to its approval of the plan amendments challenged in *Douglas*.[15] *Id.* at 10-11. But that grievance is better addressed to CMS than to the *Douglas* plaintiffs.[16] Even if CMS's decision was based on the concern that preemption-related injunctions had caused providers to accumulate so much in over-reimbursements that recoupment risked "harm [to] providers and beneficiaries," *id.* at 11, its determination was an exercise of agency discretion.

California's second example is no more persuasive. The state argues that it suffered losses in a case where a district court enjoined an amendment after refusing to give deference to CMS's approval. The injunction was vacated on appeal, but California avers that it was forced to divert resources to meet the pre-amendment reimbursement rates in the interim. *See Managed Pharmacy Care* v. *Sebelius*, 716 F.3d 1235 (9th Cir. 2013) *cert. denied*, 134 S. Ct. 900 (2014) and *cert. denied sub nom. California Med. Ass'n* v. *Sebelius*, 134 S. Ct. 986 (2014).

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[15] CMS regulations provide that an amendment affecting a State's "payment methods and standards" may "become effective not earlier than the first day of the calendar quarter in which an approvable amendment is submitted." 42 C.F.R. § 447.256.

[16] Or perhaps to California itself: The State appears to have been at least partially to blame for the delay, refusing to provide CMS with information concerning the impact of the proposed amendments on beneficiary access when it originally submitted them for approval, then failing to respond to CMS's specific follow-up requests for that information for nearly two years. *See* U.S. Br. 2a-3a, *Douglas*, 132 S. Ct. 1204 (2012).

What California does not—and cannot—explain is how foreclosing preemption suits would prevent such a disruption in the future. Any aggrieved party may always challenge a final determination by CMS under the Administrative Procedure Act, just as the plaintiffs did in the very case California cites. *See id.* at 1240. The risk that a district court will enjoin an amendment approved by CMS and be reversed on appeal is not eliminated by foreclosing preemption suits.

c. Finally, Petitioners argue that Section 30(A) is not amenable to enforcement because it "does not obligate the State to do *anything*." Pet. Br. 52 (emphasis in original). Not so. Section 30(A) unambiguously requires States that participate in Medicaid to set their reimbursement rates according to certain criteria. If the Act does not mandate particular rates, it nevertheless bars States from enacting regulations that purport to set Medicaid reimbursement levels in a manner inconsistent with those criteria.[17] *Perez*, 402 U.S. at 652 (Supremacy Clause invalidates any regulation that "frustrates the full effectiveness of federal law"). Respondents' objection is relevant—if at all—only to the nature of the relief a court may grant. But there can be no question that courts may enjoin the implementation of rate plans developed without regard to the statutory factors, or

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[17] Respondents' analogy to the national minimum drinking age provision, 23 U.S.C. § 158, makes little sense. Pet. Br. 51. State alcohol regulations do not purport to regulate the nation's highways. By contrast, a state's Medicaid reimbursement rates dictate how providers who participate in Medicaid will be paid. That is precisely the field Congress regulated with Section 30(A).

require state officials to bring existing plans in line with federal law by undertaking "such methods and procedures" as the Act requires.

CONCLUSION

The long-established ability to challenge state law under the Supremacy Clause is crucial to ensuring that States respect their Medicaid Act commitments to the neediest Americans. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RECORD AND BRIEFS

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RICHARD ARMSTRONG, *et al.*,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AMERICAN DENTAL ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS, AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AND CALIFORNIA MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are among the most prominent medical and dental professional associations in the United States.[1] Collectively, the members of *amici* provide medical and dental services to millions of Medicaid patients. *Amici* are profoundly interested in this case because the States' failure to comply with the Medicaid Act's "equal access" provision has a well-documented, negative impact on patient care. Restricting the availability of a judicial remedy would leave Congress's mandate of "equal access" an empty promise.

The American Medical Association ("AMA"), through its House of Delegates, enables substantially all physicians and medical students in the United States to participate through their State or specialty medical societies in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health.

The American Dental Association ("ADA") is the world's largest professional association of

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[1] Pursuant to Rule 37.3(a), all parties have filed letters with the Clerk granting blanket consent to the filing of amicus briefs. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part. The Litigation Center of the AMA has provided funding for this brief. No other person or entity has made any monetary contribution to the preparation or submission of this brief.

dentists. The ADA is committed to the public's oral health, and to the ethics, science, and professional advancement of dentistry. On behalf of its more than 155,000 members, the ADA is vitally concerned with access-to-care issues and serves as a principal advocate on issues affecting oral health.

The American Academy of Pediatrics ("AAP") represents 62,000 primary care pediatricians, pediatric medical sub-specialists, and pediatric surgical specialists. Its mission is to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. AAP is the largest professional association of pediatricians in the world.

The American Congress of Obstetricians and Gynecologists ("ACOG") represents more than 50,000 obstetricians and gynecologists and residents in obstetrics and gynecology. ACOG is dedicated to the advancement of women's health care and to establishing and maintaining the highest possible standards of practice. ACOG also promotes policy positions on issues affecting the specialty of obstetrics and gynecology and supports quality health care for every woman throughout her life.

The American Academy of Family Physicians ("AAFP"), headquartered in Leawood, Kansas, is the national association of family doctors. Founded in 1947 as a not-for-profit corporation, its members are physicians and medical students from all 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Uniformed Services of the

United States. As part of its mission, the AAFP seeks to improve the health of patients, families, and communities by serving the needs of members and their patients with professionalism and dignity and by advocating for public health.

The American College of Emergency Physicians ("ACEP") is a non-profit, voluntary professional and educational society of over 32,000 emergency physicians practicing in the United States and other countries. ACEP fosters the highest quality of emergency medical care through: the education of emergency physicians, other health care professionals, and the public; the promotion of research; the development and promotion of public health and safety initiatives; and the provision of leadership in the development of health care policy.

The California Medical Association ("CMA") is a not-for-profit professional association for physicians with nearly 40,000 members. CMA physician members practice medicine in all specialties and modes of practice throughout California, including participating in the Medi-Cal program. CMA encourages physician participation in government health care programs, such as Medi-Cal, in order to ensure that all Californians have adequate access to medically necessary health care services. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession.

SUMMARY OF ARGUMENT

Federal jurisdiction under the Supremacy Clause to entertain suits in equity to enjoin inconsistent State laws has been recognized numerous times by this Court. This principle has never been (and should not now be) limited to "anticipatory defenses" to State enforcement actions. Respondents thoroughly set forth these arguments and the long line of authority supporting them. There is no need to reiterate those arguments, which create a compelling legal rationale for affirmance. Instead, *amici* focus on the important role of private actions to enforce the supremacy of federal law, including Section 30(A)'s equal-access mandate and other sections of the Medicaid Act, and urge this Court to refrain from deciding issues that are not briefed or presented for decision here.

* * *

Codified in Section 30(A) of the Medicaid Act, the "equal access" provision requires that States choosing to accept federal Medicaid funds must set provider reimbursement rates that are, *inter alia*, "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). In enacting this provision, Congress recognized that, "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the [Medicaid] program." H.R. Rep. No. 101–247, at 390 (1989). And, without

participating providers, Medicaid patients will inevitably receive inferior and unequal access to health care, contrary to the intent of Congress and the overriding purpose of the Medicaid Act.

Despite Congress's mandate, "equal access" has been largely illusory for millions of America's most vulnerable citizens. Motivated largely by budgetary concerns, some States have reduced reimbursement rates without even considering the effect it would have on access to care. These rates often fall below providers' average cost to deliver the service. It is therefore unsurprising that federal courts, medical researchers, and governmental bodies have found a gap between access to health care for those with Medicaid, as compared to those with private insurance and Medicare.

Every day in their own practices, members of the *amici* observe this reality and witness the human suffering caused by the States' non-compliance. As one court has aptly summarized:

> This case is about people—children and adults who are sick, poor, and vulnerable—for whom life, in the memorable words of poet Langston Hughes, "ain't been no crystal stair." It is written in the dry and bloodless language of "the law"—statistics, acronyms of agencies and bureaucratic entities, Supreme Court case names and quotes, official governmental reports, periodicity tables, etc. But let

> there be no forgetting the real people to whom this dry and bloodless language gives voice: anxious, working parents who are too poor to obtain medications or heart catheter procedures or lead poisoning screens for their children . , elderly persons suffering from chronic conditions like diabetes and heart disease who require constant monitoring and medical attention. Behind every "fact" found herein is a human face and the reality of being poor in the richest nation on earth.

Salazar v. District of Columbia, 954 F. Supp. 278, 281 (D.D.C. 1996).

Nearly twenty-five years of history demonstrates that private actions are indispensable to enforcing Section 30(A). Recognizing that State reductions to reimbursement rates may represent the difference between life and death, Medicaid beneficiaries and providers have long relied on private lawsuits to remedy States' non-compliance with the equal-access mandate. While these lawsuits, brought pursuant to the Supremacy Clause and 42 U.S.C. § 1983, require a great deal of time and resources, they have succeeded in bridging the access gap. As explained below, private enforcement has achieved significant progress in entire States, resulting in increased reimbursement rates, greater provider participation, and ultimately improved access to care. This success has come in the form of injunctive relief, consent decrees, settlement

agreements, and political action spurred by the litigation. Whatever the form of relief, private enforcement has saved lives and improved the health of those who need it most, including low-income children and people with disabilities.

By contrast, the federal government's administrative enforcement tool—a revocation of funding—is extreme and would devastate rather than benefit the individuals whom Medicaid was designed to protect. In fact, the federal government has rarely, if ever, cut funding to a State for violating the equal-access mandate. States know that federal enforcement is a paper tiger. And Petitioners now candidly express the view that, despite Section 30(A)'s mandatory language, it "does not obligate the State to do *anything*." Pet. Br. 52 (emphasis in original). Thus, absent private enforcement, Congress's promise of equal access will go unfulfilled.

Accordingly, *amici* urge this Court to affirm the decision below and re-affirm the long-recognized existence of a Supremacy Clause cause of action. This case presents a single question under the Supremacy Clause, and the Court should resist the suggestion at places in Petitioners' and certain *amici*'s argument to go beyond that question and decide other issues.

ARGUMENT

A. The Medicaid Act, Children's Health Care, and the Promise of "Equal Access"

"The Medicaid program was established in 1965 in Title XIX of the [Social Security] Act for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Schweiker v. Hogan*, 457 U.S. 569, 571 (1982) (citation omitted). States participating in Medicaid must have a plan for medical assistance approved by the Secretary of Health and Human Services ("HHS") that "provide[s] coverage for the 'categorically needy' and, at the State's option, may also cover the 'medically needy.'" *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650–51 (2003) ("*PhRMA*") (footnotes omitted). Thus, the central purpose of the Medicaid program is to "furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

From early on, the President and Congress placed special emphasis on health care for low-income children. In 1967, Congress amended the Medicaid Act to impose a mandatory children's health care program—now known as Early and Periodic Screening, Diagnosis, and Treatment ("EPSDT")—upon every State choosing to accept federal Title XIX funds. See Pub. L. No. 90–248, 81 Stat. 821. The children's health amendments were enacted amid growing concerns about the unavailability of pediatric health care and

correlative effects on education. In a "Special Message to Congress," President Lyndon B. Johnson explained:

> Recent studies confirm what we have long suspected. In education, in health, in all of human development, the early years are the critical years. Ignorance, ill health, personality disorder—these are disabilities often contracted in childhood: afflictions which linger to cripple the man and damage the next generation. Our nation must rid itself of this bitter inheritance. Our goal must be clear—to give every child the chance to fulfill his promise.[2]

Unfortunately, many of the problems identified by President Johnson in 1967 persisted. As a result, Congress amended the Act in 1989 and "imposed a mandatory duty upon participating states to provide EPSDT-eligible children with all the health care, services, treatments and other measures described in § 1396d(a) of the Act, when necessary to correct or ameliorate health problems discovered by screening, regardless of whether the applicable state plan covers such services." *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589–90 (5th Cir. 2004); see 42 U.S.C. § 1396d(r)(5).

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[2] http://www.presidency.ucsb.edu/ws/index.php?pid=28438.

That same legislation also mandated access to "care and services under the [Medicaid] plan at least to the extent that such care and services are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). This "equal-access" mandate lies at the heart of the Medicaid regime, for it was designed to help effectuate Medicaid's overriding purpose of eliminating "dual-track" medical care. See Watson, *Medicaid Physician Participation: Patients, Poverty, and Physician Self-Interest*, 21 Am. J.L. & Med. 191, 195–98 (1995). But it could accomplish that purpose only if beneficiaries, including low-income children, actually received the care for which they were eligible.

To provide such access, Congress recognized the need to ensure provider participation. Congress "heard testimony that Medicaid participation of physicians generally, and obstetricians and pediatricians in particular, [was] inadequate" because of low reimbursement rates, and the accompanying House Report found that such rates were an "important factor" in a physician's decision whether to accept Medicaid patients. H.R. Rep. No. 101–247, at 389–90 (1989). The Report observed that, "without adequate payment levels, it is simply unrealistic to expect physicians to participate in the program." *Id.* at 390. Congress codified this common-sense correlation between rates, provider participation, and equal access to care in Section 30(A), requiring States to set rates that are "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available

to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A).

B. The Access Gap Between Congressional Promise and State Implementation

Despite Congress's mandate, equal access remains elusive for many Medicaid beneficiaries. Reimbursement rates lag behind private insurance and Medicare; participating providers remain sparse in many areas of the country; and access to health care services remains unequal. The consequences can be fatal.

"Because Medicaid is one of the largest expenditures in every state budget, and one of the fastest-growing, it makes an unavoidable target." Sack & Pear, *States Consider Medicaid Cuts as Use Grows*, N.Y. Times, Feb. 19, 2010. In 2012, 32 States reduced and/or froze Medicaid rates, and 23 did so in 2013. See Nat'l Governors Ass'n & Nat'l Ass'n of State Budget Officers, *The Fiscal Survey of States: An Update on State Fiscal Conditions* 58 (2012 & 2013). Medicaid rates for primary care physicians and dentists thus remain a fraction of private insurance and Medicare. See, *e.g.*, Nasseh, et al., *A Ten-Year, State-by-State, Analysis of Medicaid Fee-for-Service Reimbursement Rates for Dental Care Services* 4–5 (Am. Dental Ass'n 2014); Zuckerman & Goin, *How Much Will Medicaid Physician Fees for Primary Care Rise in 2013?: Evidence from a 2012 Survey of Medicaid Physician Fees* 5–7 (Urban Inst. 2012). In some instances, rates "are not even

adequate to meet overhead expenses," *Clark v. Kizer*, 758 F. Supp. 572, 577 (E.D. Cal. 1990), aff'd in relevant part sub nom. *Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992) (unpublished), effectively requiring providers to pay out of pocket to treat Medicaid patients, a fanciful proposition.

Indeed, reimbursement rates are just as important to physician participation today as they were twenty-five years ago. In 2011, the Government Accountability Office ("GAO") estimated that, of the providers who elected not to participate in Medicaid and the related Children's Health Insurance Program ("CHIP"), 95% were influenced by low reimbursement rates. U.S. Gov't Accountability Office, *Medicaid and CHIP: Most Physicians Serve Covered Children but Have Difficulty Referring Them for Specialty Care*, GAO–11–624, at 18 (2011); see also Kaiser Comm'n on Medicaid & the Uninsured, *Physician Willingness and Resources to Serve More Medicaid Patients: Perspectives from Primary Care Physicians* 9 (2011) (89% of primary care physicians cited inadequate reimbursement as a reason for accepting only some or no new Medicaid patients).

"Empirical studies confirm that doctors avoid treating Medicaid patients when Medicaid rates are lower than Medicare and private insurance rates." Watson, at 197. And because States often cut rates for purely budgetary reasons, they often do so without even considering the impact they will have on access to care. See, *e.g.*, App. 4 to Pet. for Cert.; *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*,

572 F.3d 644, 655–56 (9th Cir. 2009), vacated and remanded on other grounds sub nom. *Douglas v. Indep. Living Ctr. of So. Cal., Inc.*, 132 S. Ct. 1204 (2012); *Ark. Med. Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 529–31 (8th Cir. 1993); *Amisub (PSL), Inc. v. State of Colo. Dep't of Social Servs.*, 879 F.2d 789, 799–801 (10th Cir. 1989). Predictably, the result is that access to health care is inferior for many Medicaid recipients when compared to that enjoyed by those with private insurance and/or Medicare. Studies have documented this phenomenon across various medical fields.[3]

Government reports tell the same story. In 2008, the GAO found that "children in Medicaid were almost twice as likely to have untreated tooth decay" as those with private insurance, with only

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[3] See, *e.g.*, Rhodes, et al., *Primary Care Access for New Patients on the Eve of Health Care Reform*, 174 JAMA Internal Med. 861 (2014); Iobst, et al., *National Access to Care for Children with Fractures*, 33 J. Pediatric Orthopaedics 587 (2013); Bisgaier, et al., *Disparities in Child Access to Emergency Care for Acute Oral Injury*, 127 Pediatrics e1428 (2011); Bisgaier & Rhodes, *Auditing Access to Specialty Care for Children with Public Insurance*, 364 New Eng. J. Med. 2324 (2011); Decker, *Medicaid Payment Levels to Dentists and Access to Dental Care Among Children and Adolescents*, 306 JAMA 187 (2011); Skaggs, et al., *Access to Orthopedic Care for Children with Medicaid Versus Private Insurance: Results of a National Survey*, 26 J. Pediatric Orthopaedics 400 (2006); Med. Access Study Group, *Access of Medicaid Recipients to Outpatient Care*, 330 New Eng. J. Med. 1426 (1994).

one in three such children receiving any dental care at all. *Medicaid: Extent of Dental Disease in Children Has Not Decreased, and Millions Are Estimated to Have Untreated Tooth Decay*, GAO–08–1121, at 4 (2008). In 2011, the GAO found that about 80% of physicians accepted privately-insured children as new patients, while less than 50% accepted children enrolled in Medicaid and CHIP 2011 GAO Report, *supra*, at 10. It further estimated that 84% of participating physicians experienced difficulty in referring Medicaid and CHIP children to specialists, compared with only 26% for privately-insured children. *Id.* at 20. In November 2013, the GAO reiterated that, "for most services, access to care for" children enrolled in Medicaid and CHIP is "lower than that of the privately insured, particularly for dental care." *Children's Health Insurance: Information on Coverage of Services, Costs to Consumers, and Access to Care in CHIP and Other Sources of Insurance*, GAO–14–40, at 27–28 (2013). And, recently, an HHS investigation spanning 32 States revealed "that Medicaid managed care enrollees may not be able to make appointments with as many as half of the providers listed by their plans." Dep't of Health & Human Servs., Office of Inspector Gen., *Access to Care: Provider Availability in Medicaid Managed Care* 5, 8 (2014).[4]

The lack of provider participation and resultant unequal access can be deadly. For example, in 2007, a 12-year old Medicaid recipient

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[4] http://oig.hhs.gov/oei/reports/oei-02-13-00670.pdf.

named Deamonte Driver died from a brain infection caused by untreated tooth decay. Otto, *For Want of a Dentist*, Wash. Post, Feb. 28, 2007. "A routine, $80 tooth extraction might have saved him." *Ibid.* But his mother was unable to find a Medicaid-participating dentist to provide preventive care for Deamonte and his brother, who had six rotted teeth. *Ibid.* "By the time Deamonte's own aching tooth got any attention, the bacteria from the abscess had spread to his brain." *Ibid.* After two operations, and more than six weeks of hospital care (costing more than $250,000), he died. *Ibid.*

C. Private Litigation Has Successfully Narrowed the Access Gap

To compel compliance with the supremacy of federal law, beneficiaries and providers have repeatedly turned to the courts. These actions have successfully remedied equal-access violations and spurred significant improvement in provider participation and access to care. Two exemplar cases, which proceeded to a full trial on the merits, vividly illustrate the indispensable role of private enforcement.

1. *Memisovski*

The *Memisovski* case was a class action brought on behalf of all Medicaid-eligible children in Cook County, Illinois, among the most populous counties in the United States. *Memisovski ex rel. Memisovski v. Maram*, 2004 WL 1878332 (N.D. Ill. Aug. 23, 2004). By the time of trial, approximately

600,000 Cook County children were on Medicaid. *Id.* at *11. After the trial, the court ruled in the plaintiffs' favor, issuing extensive findings of fact and conclusions of law. See *id.* at *11–56.

The findings chronicle both statistical and anecdotal evidence of a Medicaid system that often provided no health care at all, let alone "equal access." The court determined that most physicians in Cook County either did not see Medicaid-enrolled children at all, or significantly limited their Medicaid practices. See *id.* at *17. This lack of providers had a predictable negative effect on patient care. For instance, the court found that approximately 90% of Medicaid-enrolled children in Cook County had never received a vision examination, 80% had never received a hearing examination, and 75% had never received a dental examination. *Id.* at *30. The court relied upon expert analysis showing that approximately one-third of the pediatric Medicaid population had never received "any preventive health care at all." *Id.* at *23.

"[M]any of the physicians testified that Medicaid children frequently use the emergency room as a source of primary care because they simply have nowhere else to go." *Id.* at *44. A pediatric emergency room doctor testified that Medicaid-enrolled children with asthma, gastroenteritis, flu, and diabetes "frequently presented [at the emergency room] with more aggravated or serious symptoms as a result of lack of primary care." *Ibid.* The head of one Chicago

emergency room testified that Medicaid patients frequently arrived with "conditions that privately-insured patients do not typically have and which reflect a lack of primary care, including untreated bone fractures or advanced asthmatic conditions." *Ibid.*

The court also relied on the testimony of Medicaid recipients, such as Yesinia Rodriguez. Ms. Rodriguez testified concerning the extraordinary difficulty she had in locating a physician who would accept Medicaid. When she called the Illinois hotline for a physician referral, she was given the names of approximately ten different doctors, all of whom practiced more than thirty miles away and *none* of whom accepted Medicaid. *Id.* at *18. When she called again, she was given contact information for twenty more doctors. *Ibid.* Once again, however, *not one* of those doctors accepted Medicaid. *Ibid.*

The court's findings concerning Illinois' Medicaid payment rates explained why access to needed care was inadequate. Indeed, the defendants admitted that Medicaid rates were low, unattractive, and set without any consideration of the effect on access. *Id.* at *45. The court found that Medicaid rates in Illinois were approximately 50% of Medicare rates and that "[a] pediatrician practice relying solely on Medicaid beneficiaries maximum reimbursements could not survive since Medicaid pays nearly 10% less than the median practice costs." *Id.* at *12–13. In summarizing the overwhelming evidence put on by the plaintiffs, the court stated:

> Testimony showed that Medicaid-enrolled children face conditions such as longer waiting times for care, a more limited population of providers willing to provide care, and multiple trips to the doctor for services which could be addressed in one visit. All in all, the doctors painted a picture of Medicaid-enrolled patients being afforded a significantly lesser degree of access to care than that enjoyed by privately-insured children.

Id. at *43 (internal citations omitted).

The court ultimately entered a consent decree, requiring the State to "provide plaintiffs with (i) Equal Access to pediatric care and services and (ii) EPSDT Services." Case No. 1:92–cv–1982, Doc. 422 at 9 ¶ 4 (filed N.D. Ill. Nov. 18, 2005). The decree effectively reformed the State's primary-care system and turned around Medicaid in Illinois. Indeed, a study revealed that, in the years following the decree, the number of beneficiaries "grew considerably," hospital and emergency room visits declined, savings increased while costs decreased, and "[q]uality [of care] improved for nearly all metrics." Phillips, Jr., et al., *Cost, Utilization, and Quality of Care: An Evaluation of Illinois' Medicaid Primary Care Case Management Program*, 12 Annals of Family Med. 408, 408, 411–12 (2014).

2. *OKAAP*

As in *Memisovski*, the plaintiffs in *OKAAP* were successful in proving wholesale violations of the equal-access mandate, and the district court issued detailed findings of fact evincing non-compliant and badly broken Medicaid programs. *Okla. Chapter of the Am. Academy of Pediatrics ("OKAAP") v. Fogarty*, 366 F. Supp. 2d 1050 (N.D. Okla. 2005). The court's findings and conclusions meticulously set out the Oklahoma defendants' continuing, serious, and knowing failures to assure that eligible children received health care services required by the Medicaid Act.

> The testimony from providers and parents of class members alike was that recipients have great difficulty accessing needed health care services in Oklahoma. As plaintiffs established, the lack of physician participation in Medicaid forces class members either to wait for unreasonable periods of time to receive needed care or to travel long distances to find Medicaid participating providers, putting these children at *risk of harm* ***or even death***.
>
> The testimony at trial also demonstrated that providers are widely opting out of the Medicaid program or restricting their Medicaid caseloads.

> *Finally, defendants admitted at trial that reimbursement rates are inadequate and that the equal access provision is being violated.*

Id. at 1107 (emphases added; internal numbering omitted).

The evidence in the case was extensive. For instance, the court found that one young Medicaid patient died while awaiting a delayed airway surgery. *Id.* at 1100. At the time of the class-certification hearing, one named plaintiff "had been unable to secure a medically necessary prosthetic shoe insert to replace her amputated foot." *Id.* at 1088. The primary care physician of another named plaintiff had attempted, without success, for approximately three years to find *any* Medicaid-participating facility to perform a necessary diagnostic sleep study. *lbid.*

The court found generally that Medicaid "recipients in Oklahoma often experience long delays in obtaining appointments for provision of medically necessary care." *Id.* at 1079. Access to neurological care was of particular concern. Pediatric Medicaid patients in Oklahoma City with seizure disorders were forced to "wait *around a year* to be seen by a pediatric neurologist." *Id.* at 1067 (emphasis added). "Some of these patients ha[d] poorly controlled seizures," and, as the court found, "without the prompt care of a neurologist, the seizures will have a negative impact on school performance, development, behavior, and the overall

medical well-being of these children." *Ibid.* (quotation marks omitted). The court noted the chilling account of one parent who "testified that she had to drive her daughter for four hours to see a pediatric neurologist, and her daughter experienced a severe seizure en route." *Ibid.*

Office-based ear, nose, and throat ("ENT") specialists in Oklahoma simply refused to treat children on Medicaid. *Id.* at 1067–68. "The lack of Medicaid participation by private practice ENT specialists ha[d] created almost a crisis situation" at one medical center. *Id.* at 1068 (quotation marks omitted). A pediatric thoracic surgeon in Tulsa described access to orthopedists accepting Medicaid as "extremely poor." *Id.* at 1069. The court noted the testimony of another Tulsa pediatrician regarding "a six-week ordeal his office encountered attempting, without success, to secure an orthopedic consult for a four-year-old girl with a fractured toe." *Ibid.*

Statistical and anecdotal evidence alike showed significant disparities in access to care. Only 34% of Oklahoma's pediatricians participated fully in the Medicaid program, while 69% of Oklahoma's pediatricians accepted all new privately-insured patients. *Id.* at 1063. The many physicians who testified at trial corroborated these statistics. A pediatric neurologist, who had ceased accepting new Medicaid patients, testified that "children on Medicaid [did] not have the same access to neurological services provided to children with private insurance because of low or nonexistent Medicaid reimbursement." *Id.* at 1067. Another

pediatrician testified that, while access to ENT specialists was extremely poor for Medicaid patients, "children with private insurance ha[d] no problems accessing ENT services." *Id.* at 1068.

Consistent with the 2011 GAO Report, the court found that "[a]pproximately ninety-three percent (93.2%) of Oklahoma's pediatricians report[ed] that low reimbursement [was] a very important reason why they would limit their participation in the Medicaid program." *Id.* at 1075. "From 1995 through December 31, 2003, provider reimbursement under Oklahoma's Medicaid fee-for-service schedule never exceeded 72% of Medicare." *Id.* at 1059. By contrast, "[u]nder commercial plans, Oklahoma physicians were reimbursed at rates of 130% to 180% of Medicare." *Id.* at 1060. As the Chief Executive Officer of Oklahoma's Medicaid agency candidly admitted, Oklahoma's Medicaid physician reimbursement rates "are low, were low, and that this is a factor that makes it difficult to recruit physicians." *Id.* at 1075 (citation omitted).

In response to the lawsuit, the State increased reimbursement rates to 100% of Medicare rates. *Medicaid Ruling Reversed*, Tulsa World, Jan. 4, 2007, at A1. While the Tenth Circuit later reversed,[5] the State decided that it would

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[5] The court of appeals reversed on purely legal grounds—partly on a basis later overruled by Congress, see *Leonard v. Mackereth*, 2014 WL 512456, at *6–7 (E.D. Pa. Feb. 10, 2014) (discussing 2010 amendment to 42 U.S.C. § 1396d(a))—and did *not* challenge the district court's

nonetheless maintain those increased reimbursement rates. *Ibid.* Thus, the litigation effectively resulted in increased rates, and, in turn, increased access to care for children in Oklahoma. Indeed, from the commencement of the litigation in 2001 to 2011, EPSDT screening ratios increased from 56% to 74%, EPSDT participant ratios increased from 40% to 55%, and the number of eligible children receiving any dental services increased from approximately 69,000 to approximately 258,000. See Annual EPSDT Participation Report: Form CMS-416 73–74 (2001); *id.* at 106–07 (2011).[6]

* * *

These success stories serve only as examples. In addition to awarding relief after full trials, courts have repeatedly awarded preliminary injunctive relief to stave off Medicaid rate cuts. See, *e.g.*, *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010), vacated and remanded on other grounds sub nom. *Douglas*, 132 S. Ct. 1204 (2012); *Long Term Care Pharmacy Alliance v. Ferguson*, 260 F. Supp. 2d 282 (D. Mass. 2003), vacated and remanded on other grounds, 362 F.3d 50 (1st Cir. 2004); *Ark. Med. Soc'y, Inc. v. Reynolds*, 834 F. Supp.

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underlying findings of fact. See *OKAAP*, 472 F.3d 1208, 1214–15 (10th Cir. 2007).

[6] Reports available at: http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Early-and-Periodic-Screening-Diagnostic-and-Treatment.html.

1097, 1101–05 (E.D. Ark. 1992). The availability of such injunctive relief is vital, for, once the rate reductions go into effect, access to care can be significantly curtailed. See, *e.g.*, *Maxwell-Jolly*, 572 F.3d at 656–57 ("some medical providers have refused to treat Medi-Cal recipients since the ten percent rate reduction was implemented").

Private lawsuits have also produced settlements significantly improving access to care. For example, a 2008 agreement settling a Connecticut lawsuit increased dental reimbursement rates, generating a dramatic increase in provider participation and access. Ct. Health Found., *Impact of Increased Dental Reimbursement Rates on HUSKY A-Insured Children: 2006–2011* (Feb. 2013).[7] A study comparing conditions before and after the settlement found that: "[p]rivate dentist participation in the Medicaid program more than doubled;" continuously-enrolled children with at least one dental visit per year grew from 46% to 69.5%, surpassing even the rate of children with private insurance; "[t]he increase in utilization occurred across all three major services types," namely diagnostic, preventive, and treatment; and "utilization rates increased in 167 of 169 of Connecticut's cities and towns," with 158 towns experiencing double-digit increases. *Id.* at 3–5.

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[7] http://www.cthealth.org/wp-content/uploads/2013/02/impact-of-increased-dental-reimbursement-rates.pdf.

Improvement in provider participation and access to care would not have occurred absent private enforcement. The "federal government lacks the financial, legal, logistical, and practical wherewithal comprehensively to enforce § 30(A) against the states." *Douglas*, Br. Former HHS Officials as *Amici Curiae*, 2011 WL 3706105, at *4, 27, (filed Aug. 5, 2011); see Donenberg, Note, *Medicaid and Beneficiary Enforcement: Maintaining State Compliance with Federal Availability Requirements*, 117 Yale L.J. 1498, 1501–02 (2008). Indeed, the only enforcement tool available to the Secretary of HHS—revocation of a State's federal funding, 42 U.S.C. § 1396c—is the administrative equivalent of a nuclear bomb. "[A] funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 52 (1981) (White J., dissenting in part). Were the Secretary to revoke funding of a State's Medicaid program for non-compliance with Section 30(A), recipients would lose health coverage altogether, turning a crisis into a catastrophe. States know that this "remedy is so destructive to the underlying aid program that it is rarely, if ever, invoked." Donenberg, at 1502 (citation omitted).

The facts in *Douglas* illustrate the limitations of HHS enforcement. There, California implemented rate cuts before even submitting State plan amendments ("SPAs") to HHS's Centers for Medicaid & Medicaid Services ("CMS") for approval, notwithstanding well-established circuit precedent requiring the States to "submit and obtain

approval *before* implementing any material change in a plan." *Arc of Cal. v. Douglas*, 757 F.3d 975, 984 n.4 (9th Cir. 2014). California later submitted SPAs but continued implementing the cuts while the SPAs were pending, even after CMS informed California that it could not approve the SPAs without additional information regarding compliance with Section 30(A). And, most revealing, California continued to implement the cuts even after CMS denied the SPAs for non-compliance with the equal-access provision, which did not occur until over two years after the cuts were originally implemented.[8] The only cuts that the State did not unilaterally implement throughout this period were those that had been enjoined as a result of private litigation. See *Douglas*, Br. Am. Health Care Ass'n, et al. as *Amici Curiae*, 2011 WL 3488988, at *19–20 (filed Aug. 5, 2011); *Douglas*, Br. Intervenor Resp. in No. 09–958 & Cal. Pharmacists Resp. in No. 09–1158, 2011 WL 3288335, at *4–7, (filed July 29, 2011);

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[8] Contrary to the suggestion of one of Petitioners' *amici*, see Cal. HHS Br. 11, CMS denied the SPAs not because of the court's injunction, but rather "because California ha[d] not demonstrated that it would meet the conditions set out in section 1902(a)(30)(A)." *Douglas*, U.S. Cert. Amicus Br. in No. 09–958 2a (filed Dec. 3, 2010). Indeed, California refused to provide the requested information despite being given almost two years to do so. As a secondary "concern", CMS noted that, even if California had demonstrated compliance, such late approval would have created retroactive liability for providers; but that concern arose only because of the length of delay caused by California's own non-cooperation. See *id.* at 3a.

Douglas, U.S. Cert. Amicus Br. in No. 09–958, 2010 WL 4959708, at *2–7, 1a–4a (filed Dec. 3, 2010).

Not only does this episode illustrate the limitations of HHS enforcement, but it confirms that private enforcement serves as a critical complement to federal administrative action. In *Douglas*, private enforcement enjoined certain rate cuts that California initially did not submit for approval to CMS, that CMS later denied for lack of information from California regarding compliance with Section 30(A), and that California implemented for more than three years before receiving very limited approval from CMS.[9] Moreover, in this case, CMS did approve Idaho's new rate-setting methodology, but private enforcement was still necessary to complement HHS enforcement because Idaho never implemented its new rate-setting methodology. See Resp. Br. 2–3 & n.1. Thus, private enforcement offers a more nuanced, flexible remedy of declaratory and injunctive relief capable of bringing State programs into compliance with federal law. And Congress has clearly expressed its intent that

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[9] One of Petitioners' *amici* suggests that private litigation interferes with HHS enforcement because, when CMS finally granted limited approval to certain SPAs in *Douglas*, it required California to give up all but three months' worth of claims for retroactive recoupment. See Cal. HHS Br. 10–11. But California voluntarily withdrew its request for approval for several years in which rate reductions had been enjoined. See *Douglas*, Letter from U.S. (filed Oct. 28, 2011). And, as noted above, the delay in the administrative process was attributable solely to California's refusal to timely provide information to CMS.

private enforcement play this vital role, codifying that, "[i]n an action brought to enforce a provision of this chapter [*i.e.*, the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. § 1320a–2 (1994).

Absent private enforcement, the grievous deficiencies within the Medicaid programs in Illinois, Oklahoma, and other States would have never been addressed. Thus, private enforcement is crucial to ensure equal access and effectuate the core purpose of the Medicaid Act.

D. To Avoid Disturbing the Indispensable Role of Private Enforcement, the Court Should Decide Only the Question Presented

The question presented here is whether "the Supremacy Clause gives Medicaid providers a private right of action to enforce [Section 30(A)] against a state where Congress chose not to create enforceable rights under that statute." Pet. for Cert. i. The Court should answer that question affirmatively for the reasons and long line of decisions set forth in Respondents' brief.

In resolving that question, the Court should also reject the at least implicit invitations of Petitioners and certain *amici* to decide other issues of statutory interpretation, such as whether Section

30(A) is enforceable through Section 1983, and whether Section 30(A) confers rights on recipients (as opposed to providers).

1. The Court Should Refrain From Deciding Whether Section (30)(A) Confers Rights Enforceable Through Section 1983

The plaintiffs brought this action pursuant to the Supremacy Clause, not Section 1983. That is unsurprising: Ninth Circuit precedent permitted the former, but not the latter. See *Indep. Living Ctr. of So. Cal. v. Shewry*, 543 F.3d 1050, 1065 (2008); *Sanchez v. Johnson*, 416 F.3d 1051, 1062 (2005). Given that legal and factual backdrop, the unavailability of a Section 1983 action was taken as a given for purposes of this litigation. The issue was never contested by the parties, and the lower courts had no occasion to consider it. Opining on the issue here would therefore run afoul of this Court's general rule against considering issues not litigated or considered below. See *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992). Nor has the issue been fully briefed in this Court; to the contrary, it has received only scant treatment by Petitioners and their *amici*. See Pet. Br. 18 & n.4, 22–23; U.S. Br. 11–14.

Accordingly, while this Court may recognize that the question presented assumes that Section 30(A) confers no statutorily enforceable rights, the Court itself should not decide that proposition. The

Chief Justice employed that prudent approach in *Douglas*, which also came to this Court from the Ninth Circuit with the same assumption built into the question presented. See *Douglas v. Indep. Living Ctr.*, 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting) ("Thus, *as this case comes to us*, the federal rule is that . private parties have no statutory right to sue to enforce" Section 30(A).) (emphasis added). And this Court has previously exercised such restraint with respect to threshold issues that were not fully briefed or properly presented. See, *e.g.*, *Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 164–65 (2007) ("prefer[ring] not to address" a "significant" issue "anterior" to the question presented because it "has not been fully presented"); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 404–05 (1995) (O'Connor, J., dissenting) (discussing examples); see also *Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 131 S. Ct. 746, 756 n.10 (2011) (deeming it "undesirable for us to decide a matter of this importance in a case in which we do not have the benefit of briefing by the parties"); *Ortiz v. Jordan*, 562 U.S. 180, 131 S. Ct. 884, 894–95 (2011) (Thomas, J., concurring in the judgment) (considering it "unwise" to reach an issue not considered below because it presented "difficult and far-reaching questions").

That is particularly true since any opinion declaring Section 30(A) unenforceable through Section 1983 would "cast serious doubt on longstanding precedent," a "step [this Court] historically take[s] only with the greatest caution

and reticence." *Knox v Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2299 (2012) (Sotomayor, J., concurring in the judgment). Specifically, this Court held in *Wilder* that providers could bring suit under Section 1983 to enforce the Boren Amendment to the Medicaid Act, a rate-reimbursement provision that is indistinguishable from Section 30(A). See 496 U.S. at 501–02, 524. Critically, *Wilder* remains binding precedent. Indeed, this Court re-affirmed it in *Gonzaga University v. Doe*. See 536 U.S. 273, 280–81 (2002).

Petitioners do not mention *Wilder*'s holding at all in their brief, and their *amici* refer only to legislative activity post-dating the case. See U.S. Br. 30 n.11.; Cal. HHS Br. 11–13. They emphasize that Congress repealed the Boren Amendment in 1997. But importantly, Congress declined to take any action on Section 30(A), even though at the time the Boren Amendment repeal was under consideration, Section 30(A) was already the subject of judicial enforcement by providers. See, *e.g.*, *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495–96 (9th Cir. 1997); *Visiting Nurse Ass'n of N. Shore, Inc. v. Bullen*, 93 F.3d 997, 1002–05 (1st Cir. 1996); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996); *Reynolds*, 6 F.3d at 523–28.

Congress's decision to leave Section 30(A) untouched, despite being urged to repeal it, see Resp. Br. 44, takes on greater significance given that Congress also left *Wilder* untouched, but *did* quickly act to overrule in part this Court's very next Section 1983 enforcement decision in *Suter v. Artist M.*, 503

U.S. 347 (1992). See 42 U.S.C. § 1320a–2 (1994). And, in doing so, Congress expressly preserved "the grounds for determining the availability of private actions to enforce State plan requirements . applied in prior Supreme Court decisions respecting such enforceability." *Ibid.* Despite effectively re-affirming *Wilder*, Congress's "*Suter* fix" is not mentioned in Petitioners' brief, and the Government discusses it only in the context of the Supremacy Clause issue, see U.S. Br. 29–30.

Congress has amended the Medicaid Act repeatedly in the decades since *Rosado v. Wyman*, 397 U.S. 397 (1970), held that federal courts have authority to enjoin State laws preempted by the Social Security Act's State plan requirements. And Congress has done so without changing the statutory structure to make the administrative remedy exclusive, or otherwise expressing any intent to foreclose the role of the courts. Thus, Congress's action in repealing the Boren amendment without repealing 30(A), along with Congress's enactment of the *Suter* fix, are not only relevant to whether there is an enforceable right under Section 1983, but also show that Congress did not intend to preclude Supremacy Clause actions. See Resp. Br. 42–44.

2. The Court Should Refrain From Opining on the Rights of Recipients and on Provisions Other than Section 30(A)

Because the question presented is expressly limited to both Medicaid providers and Section 30(A), this Court should limit its opinion accordingly. Whether recipients have enforceable rights under Section 30(A) is not "fairly included" in that question. S. Ct. R. 14.1(a). Recipients stand in a different position from providers, and determining whether they have enforceable rights requires an independent legal analysis not appropriate here. See, *e.g.*, *Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538, 541–44 (3d Cir. 2002) (en banc) (Alito, J.) (concluding that Section 30(A) was written to benefit Medicaid recipients, not providers).

And, as Respondents note, this Court has repeatedly held that other provisions of the Medicaid and Social Security Acts are privately enforceable. See, *e.g.*, *PhRMA*, 538 U.S. at 649–50 (Medicaid Act); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996) (per curiam) (Medicaid Act as affected by Hyde Amendment); *Rosado*, 397 U.S. at 407, 420 (Social Security Act); see also Resp. Br. 35–37 (citing additional examples). Thus, this Court should limit its opinion to providers with respect to Section 30(A) of the Medicaid Act.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision below.

Respectfully submitted,

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RICHARD ARMSTRONG, ET AL.,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN NETWORK OF COMMUNITY OPTIONS AND RESOURCES, THE AMERICAN HEALTH CARE ASSOCIATION/ NATIONAL CENTER FOR ASSISTED LIVING, THE NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, THE AMERICAN PHARMACISTS ASSOCIATION, AND AMERICA'S ESSENTIAL HOSPITALS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Supremacy Clause (U.S. Constitution, art. VI, cl. 2) affords Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) through suits against state officials.

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H.R. Rep. No. 103-761 (1994) (Conf. Rep.), *Reprinted in* 5 U.S. Code Cong. & Ad. News, 103d Cong., Second Sess. (1994) 2901 21

OTHER MATERIALS

Sean Jessee, *Fulfilling the Promise of the Medicaid Act: Why the Equal Access Clause Creates Privately Enforceable Rights*, 58 Emory L.J. 791 (2009) 6

Malcolm J. Harkins III, *Be Careful What You Ask For: The Repeal of the Boren Amendment and Continuing Federal Responsibility For Cost Effective Quality Nursing Facility Care*, 4 J. Health Care L. & Pol'y 159 (2002) 6

Abigail R. Moncrieff, *Payments to Medicaid Doctors: Interpreting the Equal Access Provision*, 73 U. Chi. L. Rev. 673 (2006) .. 6

INTEREST OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are national organizations whose members participate in state Medicaid programs across the country as providers of covered services. These providers are dependent upon Medicaid reimbursement as a means of assuring that they can provide both access to and quality of services for program beneficiaries. As such, they are keenly interested in and significantly affected by issues relating to the adequacy of Medicaid rates. The six *Amici* are:

- The American Network of Community Options and Resources ("ANCOR");
- The American Health Care Association/ National Center for Assisted Living ("AHCA/NCAL");
- The National Association of Chain Drug Stores ("NACDS");
- The National Community Pharmacists Association ("NCPA");
- The American Pharmacists Association ("APhA"); and
- America's Essential Hospitals ("AEH").

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represents that all parties have consented to the filing of this brief, and letters reflecting their blanket consents to the filing of *amicus* briefs have been filed with the Clerk.

A brief description of each *Amici* follows:

ANCOR is a national, nonprofit trade association representing 46 state provider associations and more than 800 individual private community providers of long term care supports and services for individuals with significant disabilities. Founded nearly 45 years ago, ANCOR's members serve over 400,000 individuals with disabilities, primarily intellectual and developmental, to live and work in home community settings. Medicaid is the primary payer for these services, and providers that furnish them are almost exclusively dependent upon Medicaid revenues to cover their costs. ANCOR is the leading resource and advocate for these providers in matters before Congress and the Administration, communicating and promoting their essential role in delivering critical lifespan supports and services to enable people with disabilities to realize the promise of the Americans with Disabilities Act.

AHCA/NCAL is the nation's largest association of long-term and post-acute care providers, representing the interests of over 12,000 nonprofit and for-profit facilities, many of which participate in Medicaid and serve residents who are beneficiaries of the program and dependent upon it to pay for their care. AHCA/NCAL members are dedicated to improving the delivery of professional and compassionate care to more than 1.5 million frail, elderly, and disabled citizens who live in nursing care centers, assisted living communities, and homes for individuals with intellectual and developmental disabilities. AHCA/NCAL advocates for quality care and services for these at risk Americans. In order to ensure the availability of such services, AHCA/NCAL also supports the continued vitality and financial feasibility of the

long-term and post-acute care provider community through adequate compensation by payers, including Medicaid, for the care these providers render. In this vein, the providers represented by AHCA/NCAL depend on Medicaid for large portions of their total revenues. In 2013, for example, 56% of their bed days were billed to Medicaid and, thus, adequate reimbursement rates are vital to their ability to provide quality care to the resident patients they serve.

NACDS is a 501(c)(6) nonprofit trade association. Its mission includes advancing the interests and objectives of chain community pharmacies, including highlighting their role as providers of health care services. NACDS represents 125 chain community pharmacy companies, including traditional drug stores, supermarkets, and mass merchants with pharmacies—from regional chains with four stores to national companies. These members operate more than 40,000 pharmacies in the United States and provide jobs for more than 3.8 million employees, including 175,000 pharmacists. NACDS members fill more than 2.7 billion prescriptions annually, of which a significant number are for Medicaid beneficiaries. As committed and critical members of the patient care team needed to ensure positive health care outcomes for Medicaid beneficiaries, NACDS and its members take seriously their responsibility to work to assure access of beneficiaries to their local community pharmacies and to advocate for fair compensation of these pharmacies for their services.

NCPA was founded in 1898 as the National Association of Retail Druggists and is a nonprofit trade association organized under the laws of Virginia. NCPA represents the interests of America's

community pharmacists, including the owners of nearly 23,000 independent community pharmacies. Collectively, they represent an $88.8 billion per year health care marketplace, dispense nearly 40% of all retail prescriptions, and employ more than 300,000 individuals, including over 62,000 pharmacists. NCPA's mission is to represent the interests of its member pharmacies and the health and well-being of the public they serve, including Medicaid beneficiaries. In that respect, in 2013, Medicaid covered 17% of all prescriptions dispensed at the average independent community pharmacy and, on *a per pharmacy basis*, accounted for more than $610,000 in annual revenues and 10,000 prescriptions per year.

APhA is the first-established and largest association of pharmacists in the United States. It originated in 1852 as the American Pharmaceutical Association and is now a 501(c)(6) organization, consisting of more than 62,000 practicing pharmacists, pharmaceutical scientists, student pharmacists, pharmacy technicians, and others interested in advancing the profession. APhA is dedicated to helping all pharmacists improve both medication use and patient care. Its members provide care in all practice settings, including community pharmacies, hospitals, long-term care facilities, community health centers, managed care organizations, hospice, and the uniformed services. Medicaid beneficiaries constitute a significant segment of the patients served by APhA members in these various settings.

AEH is a 501(c)(6) nonprofit trade association and a champion for hospitals and health systems dedicated to high-quality care for all. Its membership comprises more than 250 essential hospitals and health systems across the country which predominantly serve

patients covered by public programs (*e.g.*, Medicare and Medicaid) and the uninsured. Filling a safety net role in their communities, members of AEH furnish over a quarter of their inpatient and outpatient services to Medicaid patients. Despite its members' long-standing commitment to treating Medicaid and other vulnerable populations, increased Medicaid volumes at reduced or insufficient rates threaten their long-term financial viability and their ability to serve Medicaid recipients adequately. Thus, AEH and its members have a strong interest in the proper administration and strict enforcement of statutory requirements of the Medicaid Act.

All of the *Amici* strongly support Respondents' contention that 42 U.S.C. § 1396a(a)(30)(A) is privately enforceable by Medicaid providers and that the existence of such a private right of action is indispensable to ensuring compliance with the requirements of the Medicaid Act. They also fully endorse Respondents' argument that this provision is privately enforceable under the Supremacy Clause. This Court should be under no illusions that the review of proposed Medicaid state plan amendments and proposed waivers by the United States Department of Health and Human Services ("HHS"), HHS's general authority to monitor the operation of state plans in cases—like this one—where there are no proposed plan amendments, or state efforts at self-policing their own compliance with federal law suffice to assure such compliance and to make provider and beneficiary litigation unnecessary and superfluous. Decades of case law and the history of the Medicaid program resoundingly refute such notions. HHS lacks the time, staff, and resources to be the sole cop on the Medicaid beat, and the states' own self-interests create an insurmountable hurdle to their

willingness or ability to regulate themselves meticulously.

Providers have been permitted to litigate Medicaid rate issues for almost four decades, and there is simply no evidence that such actions have been counterproductive or destructive. To the contrary, Medicaid providers and beneficiaries have enjoyed a sizeable degree of success in the courts when states exceed the bounds of the Medicaid Act. There is and has been no pattern of baseless or frivolous litigation. In fact, providers and beneficiaries generally view litigation as a last resort when all other options have been exhausted. Most importantly, the ability to bring these cases is essential to assuring that Medicaid rates are sufficient to enlist significant numbers of providers into the program, creating needed access to health care services for the Medicaid population in accordance with the Medicaid Act.[2]

SUMMARY OF ARGUMENT

The Court granted *certiorari* in this case to decide whether the Supremacy Clause furnishes Medicaid providers with a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) (2013)—a Medicaid Act provision requiring that program rates meet certain

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[2] Detailed discussion of a number of these points is beyond the narrow scope of this brief but are well and fully addressed in Respondents' brief and those of other supporting *amici curiae*. *See generally* Sean Jessee, *Fulfilling the Promise of the Medicaid Act: Why the Equal Access Clause Creates Privately Enforceable Rights*, 58 Emory L.J. 791 (2009); Abigail R. Moncrieff, *Payments to Medicaid Doctors: Interpreting the Equal Access Provision*, 73 U. Chi. L. Rev. 673 (2006); Malcolm J. Harkins III, *Be Careful What You Ask For: The Repeal of the Boren Amendment and Continuing Federal Responsibility For Cost Effective Quality Nursing Facility Care*, 4 J. Health Care L. & Pol'y 159 (2002).

standards. Ironically, this Court has never decided the question of whether that provision may be privately enforced through 42 U.S.C. § 1983. The case law on that issue in the federal appeals courts is split and reflects varying and shifting views. Many of these views are premised on this Court's most recent precedents and the evolving tests it uses as to whether there are private rights of action under § 1983 in other contexts.

Congress, however, has mandated that courts use the standards established before 1992 to determine, in cases like this one, whether there is a private right of action under the Supremacy Clause or through § 1983 to enforce Social Security Act provisions. 42 U.S.C. §§ 1320a-2; 1320a-10 (2013). Although these particular mandates were not referenced by the District Court or the Ninth Circuit in this case, they have been discussed in other Ninth Circuit precedent. Unfortunately, that precedent gave off-handed and insufficient recognition of these mandates, using flawed reasoning and misunderstanding the case law in a way that would render these congressional mandates a nullity.

As a consequence, although *Amici* strenuously support affirmance of the Ninth Circuit's decision on its stated grounds, if this Court is not disposed to conclude that the Supremacy Clause may be used as a basis for private enforcement of the equal access provision, it should remand the case to the Ninth Circuit for full briefing and oral argument about the implications of these mandates and how they apply to this case. Doing so would enable this Court to avoid unnecessarily deciding an issue of constitutional dimension. It would also effectuate congressional intent as to how private rights of action under the

Supremacy Clause and § 1983 should be determined in Social Security Act cases. Finally, it would promote the commonsense and rational notion that judicial decisions in these cases must necessarily take into account what the framers of the particular legislation knew and intended at the time of enactment.

ARGUMENT

I. BACKGROUND

Under 42 U.S.C. § 1396a(a)(30)(A), otherwise known as the "equal access" provision, a state Medicaid plan must:

> [P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan. as may be necessary to safeguard against unnecessary utilization of such care and services and *to assure that payments are consistent with efficiency, economy, and quality of care* and are *sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.* (Emphasis added.)[3]

Typically, issues concerning whether a federal enactment may be judicially enforced by a private party turn upon one of three general inquiries that

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[3] Significantly, this provision establishes two separate and independent standards regarding Medicaid payments to fee-for-service providers: (1) consistency with efficiency, economy, and quality of care; and (2) sufficiency to assure provider enlistment at the levels needed to afford equal access for Medicaid beneficiaries to care.

must be answered at the outset prior to the application of any principles that govern whether a private right of action exists in a specific case. First, does the particular provision itself or the legislation of which it is a part confer such a right of action either expressly or impliedly? *E.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964). Second, if it does not, may cases be brought to enforce the provision pursuant to 42 U.S.C. § 1983?[4] *E.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 9-10 (1980). Third, if § 1983 does not function as a basis for private enforcement, does the Supremacy Clause allow for a private right of action?[5] *E.g.*, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, ___ U.S. ___, 132 S. Ct. 1204 (2012) (granting *certiorari* to decide whether the equal access

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[4] 42 U.S.C. § 1983 (2013) reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] The Supremacy Clause (U.S. Constitution, art. VI, cl. 2) provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

provision may be privately enforced pursuant to the Supremacy Clause but the case was decided on alternative grounds).

This Court has previously determined that the Social Security Act (of which the Medicaid Act is a part) does not create an express or implied right for private parties to seek judicial enforcement of its provisions. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651, 674–75 (1974). Thus, the first of the overall three private right of action inquiries is not met here.

Although the second general inquiry relating to § 1983 has generated a significant amount of inconsistent, varying, and fluctuating case law in the context of the equal access provision, this Court has never specifically addressed the issue of whether 42 U.S.C. § 1396a(a)(30)(A) may be privately enforced by either or both Medicaid providers or beneficiaries through actions under § 1983. Rather, the *assumption* appears to be that, under the private right of action criteria enunciated for § 1983 cases in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), this Court would not find that the equal access provision may be privately enforced in this manner. Nonetheless, the Circuit case law on this point includes:

> *First Circuit*: *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57–60 (1st Cir. 2004) (holding there is no private right of action for providers and, impliedly, none for beneficiaries based upon *Gonzaga*), overturning *Visiting Nurse Ass'n of N. Shore, Inc. v. Bullen*, 93 F.3d 997 (1st Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997) (pre-*Gonzaga* decision) (holding that providers have such a right of action and implying that beneficiaries do as well).

Second Circuit: *New York Ass'n of Homes and Servs. for the Aging v. DeBuono*, 444 F.3d 147, 148 (2d Cir. 2006) (per curiam) (affirming the district court decision based on *Gonzaga*, finding no private right of action for providers).

Third Circuit: *Penn. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 537-42 (3d Cir. 2002) (*en banc*) (6-5 pre-*Gonzaga* decision) (relying in part on *Blessing v. Freestone*, 520 U.S. 329 (1997), to find no private right of action for providers), *overruling Rite Aide of Penn., Inc. v. Houston*, 171 F.3d 842, 850 n.7 (3d Cir. 1999) (finding providers had such a right of action).

Fifth Circuit: *Walgreen Co. v. Hood*, 275 F.3d 475, 477-78 (5th Cir. 2001) (pre-*Gonzaga* decision) (concluding, based on *Blessing*, that providers do not have a private right of action); *Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 924-32 (5th Cir. 2000) (pre-*Gonzaga* decision) (holding, also predicted in part on *Blessing*, that beneficiaries, but not providers, have a right of action).

Sixth Circuit: *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (holding, based on *Gonzaga* and *Blessing*, no private right of action for beneficiaries or providers), overturning *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002) (pre-*Gonzaga* decision) (holding that providers have a private right of action).

Seventh Circuit: *Methodist Hosp., Inc. v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996) (pre-*Gonzaga* decision) (ruling that providers have a private right of action.)

Eighth Circuit: *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs.*, 443 F.3d 1005, 1013-16 (8th Cir. 2006) (holding that providers and beneficiaries both have a private right of action); *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs.*, 364 F.3d 925, 930 (8th Cir. 2004) (holding the same); *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs.*, 293 F.3d 472, 477-78 (8th Cir. 2002) (pre-*Gonzaga* opinion) (holding to the same effect); *Arkansas Medical Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 523-28 (8th Cir. 1993) (pre-*Gonzaga* decision) (coming to the same result).

Ninth Circuit: *Sanchez v. Johnson*, 416 F.3d 1051, 1055-62 (9th Cir. 2005) (applying *Blessing* and *Gonzaga* to conclude that neither providers nor beneficiaries have a private right of action); *Orthopedic Hosp. v. Belshe*, 103 F.3d 1491 (9th Cir. 1997) (ruling in favor of providers on the merits of an equal access claim without addressing the private right of action issue).

Tenth Circuit: *Oklahoma Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1215 (10th Cir. 2007) (concluding that neither providers nor beneficiaries have a private right of action, based on *Mandy R. v. Owens*, 464 F.3d 1139, 1146-48 (10th Cir. 2006) (using *Blessing* and *Gonzaga* to hold the same)).

Eleventh Circuit: *Tallahassee Mem'l Reg'l Med. Ctr. v. Cook*, 109 F.3d 693, 702 (11th Cir. 1997) (pre-*Gonzaga* decision) (ruling that providers have a private right of action).

In sum, seven federal appeals courts—the First, Second, Third, Fifth, Sixth, Ninth, and Tenth Circuits— have ruled that Medicaid providers have no private right of action under § 1983 to sue to enforce the equal access provision. Generally, these courts have relied heavily upon *Gonzaga* and/or *Blessing* to reach those conclusions. At least four of these same Circuits (the First, Third, Sixth, and Ninth) had expressly or impliedly found such a private right of action before effectively reversing themselves based on this Court's more recent decisions. *See* Section II(A), *infra*. Meanwhile, three federal appeals courts—the Seventh, Eighth, and Eleventh Circuits—have found such a right, although the rulings in the Seventh and Eleventh Circuits are pre-*Gonzaga*.

Likewise, the question of whether Medicaid beneficiaries have a private right of action through § 1983 to enforce the equal access provision has also been handled disparately by the Circuits. Three federal appeals courts—the Sixth, Ninth, and Tenth Circuits—have applied *Gonzaga* to determine that there is no such right of action. The Fifth and Eighth Circuits have reached the opposite conclusion, though the Fifth Circuit's decision on that point is pre-*Gonzaga*.

Plainly, although this Court has not decided the issue of whether the equal access provision may be privately enforced through a § 1983 action, its precedents in *Blessing* and *Gonzaga* have, unsurprisingly, had a material bearing on the outcomes of federal appeals court decisions on the issue.

As *Amici* now explain, there is a serious question as to whether determinations that the equal access statute cannot be privately enforced under the Supremacy Clause or through § 1983 can be squared with other congressional enactments and intent.

II. THERE IS SUBSTANTIAL DOUBT WHETHER THIS COURT'S EVOLVING STANDARDS IN PRIVATE RIGHT OF ACTION CASES SHOULD BE APPLIED IN THE CONTEXT OF THE SOCIAL SECURITY ACT

A. Over Time, The Criteria For Ascertaining Private Rights Of Action Have Changed

Tracing the history and the holdings in cases involving the question of whether a particular federal provision may be privately enforced through § 1983 could easily fill one or more editions of even the most ambitious law review journal. Over the years, the standards used to decide that issue have varied and, in recent years, have tightened, making it less likely that a private right of action will be found. A brief and non-exhaustive review of § 1983 case law highlights the evolution of these standards.

In *Thiboutot*, 448 U.S. at 4–8, this Court held that welfare beneficiaries under the Social Security Act had a private right of action to enforce federal law entitling them to benefits. At that time, the Court did not establish elements or tests for determining whether a private right of action existed in a particular case.

A year thereafter, in *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28 (1981), the Court cautioned that "the typical remedy for state

noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." At issue was whether a federal statutory bill of rights for persons with developmental disabilities (42 U.S.C. § 6010) could be privately enforced through § 1983 if their care and treatment violated those rights. The Court held that § 6010 did not confer any substantive rights—it did not "unambiguously" impose an obligation on states to meet those requirements as a condition for the receipt of federal monies. *Id.* at 12–13, 17, 27. Accordingly, because there was no substantive right, the court did not reach the issue of whether there was a private right of action under the section itself or through § 1983 to enforce the terms of § 6010. *Id.* at 28 n.21.

Subsequently, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) examined the question of whether the National Labor Relations Act[6] created certain rights that could be vindicated privately through a § 1983 action. The Court held that it did, explaining that the availability of a § 1983 remedy is conditioned upon a multi-tiered test:

(1) whether the statute creates obligations "sufficiently specific and definite" to be within "the competence of the judiciary to enforce";

(2) whether the statute is intended to benefit the putative plaintiff; and

(3) whether private enforcement is not foreclosed by the statute through either express provision or other specific evidence.

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[6] 29 U.S.C. §§ 151–169.

493 U.S. at 106–108 (quoting *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 432 (1987)).

A year later, the Court applied the *Golden State Transit* criteria to find that Medicaid providers had a private right of action to enforce the so-called Boren Amendment. That provision governed Medicaid rate setting for certain types of providers in terms that are remarkably similar to those found in the equal access provision (efficiency, economy, and quality of care and reasonable access to services by beneficiaries).[7] *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509–10 (1990).

In *Suter v. Artist M.*, 503 U.S. 347, 350 (1992), the Court reviewed the question of whether provisions of the Adoption Assistance and Child Welfare Act of 1980[8] could be privately enforced under the Act itself or pursuant to § 1983. These provisions mandated reasonable state efforts to curtail removal of children from their homes prior to placement in foster care and to return children to their homes where removal had occurred. *Id.* at 351; *see also* 42 U.S.C. § 671(a). The Court used the tenets in *Golden State Transit* to find that these provisions could not be privately enforced,

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[7] The Boren Amendment, formerly 42 U.S.C. § 1396a(a)(13)(A), was subsequently repealed by the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507. It dealt with Medicaid rates for inpatient hospital services, nursing facility services, and services provided by intermediate care facilities for the mentally retarded—the last of which are now facilities for individuals with intellectual disabilities. Notably, the equal access provision, which remained untouched by Congress when and after the Boren Amendment was repealed, governs Medicaid rate-setting for all types of Medicaid fee-for-services providers. 42 U.S.C. § 1396a(a)(30)(A).

[8] 42 U.S.C. §§ 620–628b; 670–679c (1989).

reasoning that the statutory provisions and their implementing regulations did not represent or provide notice to the states as to what failures or inactions on a state's part could trigger loss of federal funds. *Id.* at 361–62.

Blessing, 520 U.S. at 332, involved the question of whether custodial parents could privately enforce Title IV-D of the Social Security Act,[9] to assure "substantial compliance" with its requirements. *Id.* The Court found that there was no generalized private right of enforcement under this program and noted that the statutory scheme could not be analyzed on a general basis. Rather, it was necessary to distinguish among the statute's numerous provisions on an individual basis. 520 U.S. at 333. In doing so, the Court stated that, in determining private rights of action under § 1983, three factors must be considered:

(1) whether Congress intended the provision to benefit the plaintiff;

(2) whether the alleged right is sufficiently specific (and not vague or amorphous) so that its interpretation is within judicial competence; and

(3) whether the statute imposes an unambiguous obligation on the state.

Id. at 340–41.[10]

Finally, in *Gonzaga*, 536 U.S. at 276, this Court rejected the contention that provisions of the Family

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[9] 42 U.S.C. §§ 651–669b (1994).

[10] Note that the first two factors are the same as in *Golden State Transit*. The third, however, substitutes an unambiguous state obligation for private enforcement not being foreclosed by the statute.

Educational Rights and Privacy Act of 1974 could be privately enforced under § 1983.[11] Among other things, the Act precludes federal funding to educational institutions that have policies or practices of releasing educational records to unauthorized individuals. *Id.* at 279; *see also* 20 U.S.C. § 1232g(b)(1). In its ruling, the Court acknowledged that some of its opinions might be construed to allow "something less than an unambiguously conferred right" as being enforceable under § 1983, and it expressly referenced *Blessing* as an example. *Id.* at 282. It then emphasized that only an "unambiguously conferred right" would support a § 1983 cause of action. *Id.* at 283. Further, the Court opined that the discernment of whether such private rights of action exist under § 1983 should not differ from whether they exist in the context of implied rights of action. *Id.* at 283, 285. In other words, both types of situations should be approached using the same inquiries.

In sum, even a casual perusal of the case law reveals that the criteria used to assess whether a private right of action exists to enforce a particular federal provision under § 1983 have changed over time. They have become more stringent and, accordingly, made it more difficult for potential private plaintiffs to establish a private right of action. The Court itself has conceded in *Gonzaga* that its earlier precedent could allow private enforcement of something less than "an unambiguously conferred right" so long as plaintiff fell "within the general zone of interest that the statute is intended to protect," and it cited *Va. Hosp. Ass'n* on that score. *Gonzaga*, 536 U.S. at 283. As reflected below, this trend concerned Congress two decades ago

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[11] 20 U.S.C. § 1232g (1994).

and resulted in legislation designed to establish the terms upon which private right of action cases should be analyzed in the context of the Social Security Act.

B. Congress Intervened To Set The Terms Upon Which Private Right Of Action Cases Should Be Resolved Under The Social Security Act

Two years after this Court's decision in *Artist M.*, Congress passed and President Clinton signed the Improving America's School Act of 1994.[12] Section 555 of that Act is entitled "Effect Of Failure To Carry Out State Plan" and is codified at 42 U.S.C. § 1320a-2. Section 555(a) read:

> In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

Section 555(b) of that legislation dealt with the "Applicability" of this provision and directs that: "The

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[12] Pub. L. No. 103-382, 108 Stat. 3518.

amendment made by subsection (a) shall apply to actions pending on the date of the enactment of this Act and to actions brought on or after such date of enactment." The date of enactment was October 20, 1994.

The legislative history to the Improving America's School Act of 1994 furnishes insight into what Congress was seeking to achieve through this provision. The conference report to the legislation explains:

> The Adoption Assistance and Child Welfare Act of 1980 amended the Social Security Act to require States to provide in their Title IV-E plans that, in the case of each child, reasonable efforts will be made (a) prior to the placement of the child in foster care, to prevent or eliminate the need for removal of the child from his home, and (b) to make it possible for the child to return to his home (sec. 471(a)(15)).
>
> On March 25, 1992, the U.S. Supreme Court held in *Suter v. Artist M.*, that the "reasonable efforts" clause does not confer a federally-enforceable right on its beneficiaries, nor does it create an implied cause of action on their behalf. In rendering its opinion, the Court also stated that although section 471(a) does place a requirement on the States, that requirement "only goes so far as to ensure that the States have a plan approved by the Secretary which contains the 16 listed features."

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> The provision would amend Title XI of the Social Security Act by adding a new section that reads as follows: "[actual terms of provision then recited] "
>
> The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are *able to seek redress in the federal courts to the extent they were able to prior to the decision in Suter v. Artist M.*, while also making clear that there is no intent to overturn the determination in *Suter* that the reasonable efforts clause to Title IV-E does not provide a basis for a private right of action.
>
> The amendment would apply to actions pending on the date of enactment and to actions brought on or after the date of enactment.

H.R. Rep. No. 103-761, at 924, 926 (1994) (Conf. Rep.) (Emphasis added).[13]

As if to underscore its determination in this regard, Congress enacted and President Clinton signed the same provision less than two weeks later as part of the Social Security Act Amendments of 1994.[14] Section 211 of that Act is captioned "Effect Of Failure To Carry Out State Plan" and is codified at 42 U.S.C. § 1320a-10. Section 211(a) is identical to 42 U.S.C. § 1320a-2,

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[13] *Reprinted in* 5 U.S. Code Cong. & Ad. News, 103d Cong., Second Sess. (1994) 2901 at 3255, 3257.

[14] Pub. L. No. 103-432, 108 Stat. 4398.

and Section 211(b) contains the same verbiage as to its applicability.

It seems evident that Congress was seeking to accomplish several objectives in 42 U.S.C. §§ 1320a-2 and 1320a-10. First, Congress sought to overturn the criteria used in *Artist M.*, but not in earlier cases (such as *Golden State Transit* and *Va. Hosp. Ass'n*), to decide private right of action cases. At the same time, it was not seeking to reverse the result itself in *Artist M.* Second, Congress desired that, in Social Security Act cases involving allegations of failure to comply with federal mandates in state plans, the existence of a private right of action under the Supremacy Clause or § 1983 to seek enforcement must be judged by the prevailing precedent prior to *Artist M.* Third, Congress wanted these standards to be applied both to pending Social Security Act cases as of enactment and actions brought thereafter.

Notably, this Court has never cited, let alone analyzed, 42 U.S.C. §§ 1320a-2 and 1320a-10 and their implications. Nor was that done in the instant case by either the District Court or the Ninth Circuit. In one sense, that is not surprising because the Ninth Circuit had already held in *Sanchez v. Johnson*, 416 F.3d at 1062, that, based on *Blessing* and *Gonzaga*, the equal access provision could not be privately enforced under § 1983. Additionally, at that time, the Ninth Circuit made fleeting reference to 42 U.S.C. §§ 1320a-2 and 1320a-10. *Id.* at 1057 n.5. The Ninth Circuit rejected their relevancy, saying that they were "hardly a model of clarity", did not alter the reasoning of *Pennhurst* which was decided prior to *Artist M.*, and—in any event—did not change its obligation to follow *Blessing* and *Gonzaga*. *Id.*

Respectfully, the Ninth Circuit's off-handed analysis is not even facially persuasive. For instance, there is no reference to or discussion of the legislative history of these provisions. Further, the claim that *Pennhurst* remained controlling because it was decided before *Artist M.* is unconvincing. The crucial determinant in *Pennhurst* was that the plaintiffs had formulated their case based on a "bill of rights" provision that was not one of the statutory conditions for receipt of federal funds and did not provide clear notice to the states of their obligations to comply with it or lose federal funds. 451 U.S. at 12–13, 17. By contrast, the equal access provision is a Medicaid state plan requirement, represents requirements that states "must" meet in order to receive federal funding, and falls squarely within the purview of 42 U.S.C.§§ 1320a-2 and 1320a-10. Moreover, the Ninth Circuit's invocation of *Blessing* and *Gonzaga* as a reason to ignore the terms of these provisions is somewhat bewildering. Those cases were decided after *Artist M.* and, as such, are not supposed to be the basis for private right of action decisions in Social Security Act cases. Rather, pre-*Artist M.* holdings like *Golden State Transit* and *Virginia Hosp. Ass'n* are to be controlling. Equally important, the Ninth Circuit's decision condemns these statutory commands to the status of dead letter law. It is as if Congress had never passed them.[15]

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[15] The Ninth Circuit's decision on this point also seems to be at odds with holdings of other Circuits using these provisions as a basis for finding a private right of action under other Medicaid Act provisions. *E.g., S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) (right to early and periodic screening, diagnosis, and treatment services under 42 U.S.C. § 1396a(l)(10)(A)); *Rabin v. Wilson-Coker*, 362 F.3d 190, 201-02 (2d Cir. 2004) (right to Medicaid benefits under 42 U.S.C. § 1396r-6).

Congress has the right and the discretion to decide whether and how its enactments should be construed in terms of whether they afford private rights of action either on their own or under the Supremacy Clause or § 1983, and it has various means at its disposal to do so. Here, Congress has unequivocally indicated that Social Security Act cases involving state plan requirements must be reviewed under pre-*Artist M.* precedent. The Ninth Circuit failed to do that either here or in *Sanchez*.[16]

It should also be emphasized that, although *Amici's* brief has focused principally on § 1983, existing case law at the time 42 U.S.C. §§ 1320a-2 and 1320a-10 were enacted strongly suggests that the Supremacy Clause was a basis for private enforcement of federal law. *E.g.*, *Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14 (1983). *See* Br. For Respondents at 7-10, 21-27, 29-41 and Appendix thereto. The congressional directives in these sections that pre-*Artist M.* case law be used to adjudicate private rights of action in Social Security Act cases make no distinction as to the particular avenue for private enforcement. Thus, they apply with equal force to the Supremacy Clause. As such, the state of the case law in 1992 as to the Supremacy Clause and private rights of action is an independent basis for affirming the Ninth Circuit's ruling in this case. In short, under the terms of 42 U.S.C., §§ 1320a-2 and 1320a-10, the Supremacy Clause affords a

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[16] With one exception, the Petitioners and their supporting *amici* in this case do not cite or discuss 42 U.S.C. §§ 1320a-2 and 1320a-10. The brief of the United States does so (Br. For United States as Amicus Curiae Supp. Pet'r's 29–30), but is predicated on the assumption that there is no § 1983 right of action here. That assumption conveniently skirts the analysis required by those provisions and effectively renders them a nullity.

private right of action for the enforcement of the equal access provision by Medicaid providers.

Consequently, if—contrary to *Amici's* position that this case should be affirmed on the basis of the Ninth Circuit's decision—the Court decides either that the Supremacy Clause does not afford a private right of action or that it is not inclined to decide that issue, it should remand the case to the Ninth Circuit. This would permit full-blown briefing and oral argument on the issues under 42 U.S.C. §§ 1320a-2 and 1320a-10 and avoid the Court having to perform a first blush analysis of its own. By doing the latter, this Court can also follow its time-honored tradition of refraining from reaching issues involving constitutional questions when that can be averted. *E.g.*, *Califano v. Yamaski*, 442 U.S. 682, 692–93 (1979).

C. Prudential Considerations Also Suggest That Private Right Of Action Standards Erected After Passage Of The Legislation In Question Should Not Be Employed

Part of Congress' motivation in enacting 42 U.S.C. §§ 1320a-2 and 1320a-10 may have been an uneasiness that its handiwork was being judged by adjusted, modified, or entirely new private right of action standards enunciated or created judicially long after the legislation in question had been enacted. Regardless of the existence of these provisions or their implications, this Court could—on its own and without congressional direction—apply evolving principles prospectively only rather than retroactively, using instead the tenets that were in place at the time. To do otherwise ascribes a clairvoyance to Congress that it simply does not and cannot have. For example, if Congress passed a particular provision in 1980,

Congress may rightly be charged with the responsibility for knowing the private right of action case law and tests in place at that time.[17] It cannot be held accountable for foreseeing new or different standards developed years or decades later. Such a course of action is the best means of giving full voice to the real intent of those who actually framed and passed the legislation.

CONCLUSION

The Court should affirm the Ninth Circuit and hold that the Supremacy Clause affords Medicaid providers with a private right of action to enforce the equal access provision. However, if the Court either decides the Supremacy Clause issue in the negative or believes that it should avoid deciding that issue at this juncture, this case should be remanded to the Ninth Circuit for consideration of the question of whether the Respondents have a private right of action to enforce the equal access provision in light of 42 U.S.C. §§ 1320a-2 and 1320a-10.

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[17] In this case, for instance, the "efficiency, economy, and quality of care" component was enacted in 1968 in the Social Security Act Amendments of 1967, Pub. L. No. 90-248, § 237, 81 Stat. 821 (1968). The language relating to sufficient enlistment of providers to assure equal access was added in 1989 as part of the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260. Significantly, HHS has never promulgated final regulations relating to the equal access provision, though it did issue proposed regulations more than three and a half years ago. 76 Fed. Reg. 26,342 (May 6, 2011). Nor has HHS ever modified or amended its regulations to reflect the repeal of the Boren Amendment even though that occurred 17 years ago. 42 C.F.R. §§ 447.205-.256. This is telling evidence that HHS should not be entrusted with exclusive enforcement authority as to the Medicaid Act and its rate-setting standards.

Respectfully submitted,

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RECORD AND BRIEFS

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In The

Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE CALIFORNIA HEALTH AND HUMAN SERVICES AGENCY AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Supremacy Clause gives Medicaid providers a private right of action to seek judicial intervention in the rate-setting process under 42 U.S.C. § 1396a(a)(30)(A) through suits against state officials, when Congress has not created privately enforceable rights under that statute.

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INTEREST OF AMICUS CURIAE[1]

The California Health and Human Services Agency (CHHS) oversees numerous state departments, boards, and offices, including the California Department of Health Care Services (DHCS), which administers the State's Medicaid program, known as Medi-Cal.

The Director of DHCS was the petitioner in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012), in which this Court granted certiorari on essentially the same question presented here, but did not decide the issue because of a change in circumstances after certiorari was granted. *Id.* at 1211. This issue remains exceptionally important to CHHS, DHCS, and other CHHS departments, as the Ninth Circuit continues to adhere to its pre-*Douglas* rule that the Supremacy Clause creates a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) (§ 30(A)) against state officials, even though it is undisputed that Congress did not intend § 30(A) to create any privately enforceable rights. Pet. App. 2-3 (citing *Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, the departments it oversees, and its counsel has made a monetary contribution to this brief's preparation or submission.

2008) (*ILC I*)). DHCS estimates that since *ILC I* was decided in 2008, injunctions based on § 30(A) claims brought under the Supremacy Clause have cost California more than $1.5 billion by precluding DHCS from implementing cost reductions that the federal government determined are perfectly consistent with federal law. DHCS is currently defending against a number of lawsuits raising such claims.

SUMMARY OF ARGUMENT

The Supremacy Clause does not create a private right of action to enforce § 30(A) because Congress designed this complex program to be administered and enforced cooperatively by state officials and the federal Centers for Medicare & Medicaid Services (CMS) – not through individual lawsuits by private parties.[2] CHHS generally agrees with the arguments on that point set forth by petitioners and amici curiae the State of Texas, et al. This brief seeks to elaborate on two points.

1. The Court need not decide the broader question whether the Supremacy Clause can ever create a private right of action, as it is sufficient to decide this case on the narrower ground that the Supremacy

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[2] CMS is a division of the federal Department of Health & Human Services (HHS), and HHS has delegated to CMS the responsibility and authority to administer the Medicaid program. *See, e.g.*, 42 C.F.R. § 430.15(b).

Clause does not create a private right of action to enforce federal Spending Clause statutes such as § 30(A) where Congress has not clearly and unambiguously created a privately enforceable right. Federal statutes that invoke Congress's spending power to create cooperative federal-state programs are unique in two key respects.

First, such Spending Clause statutes do not automatically preempt or invalidate allegedly conflicting state laws. They give States a choice between participating in the joint program and receiving federal money, or opting not to participate and forgoing the federal funds related to that particular statute. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 28 (1981). Because States may make a lawful choice not to participate, a State's failure to satisfy a federal funding condition is not necessarily in "conflict" with federal law, and does not invoke preemption in the ordinary sense.

Second, Spending Clause legislation must clearly and unambiguously convey any obligation imposed on States accepting federal funds so that the States can make an informed decision about whether to accept the "contract." Because § 30(A) does not evince any congressional intent to subject States to private lawsuits challenging the adequacy of their rates – indeed, the text, structure, and legislative history of the Medicaid Act indicate that Congress intended to preclude such lawsuits – it is improper to impose such an obligation on unconsenting States.

2. The Court should not create a private right of action to enforce § 30(A) under the Supremacy Clause because to do so would frustrate Congress's intent and impede the state and federal governments' ability to manage States' Medicaid programs. Congress chose to centralize enforcement of the Medicaid Act's complex and often generally-phrased requirements in CMS, the federal agency with subject matter expertise in managing and overseeing the Medicaid program. And Congress intended for the States to work collaboratively with CMS to carry out that program, specifically providing an enforcement mechanism for CMS to withhold or withdraw federal funds from States if it determines that they are not meeting their obligations under the federal statutes. Where disputes arise, the Medicaid Act provides for administrative proceedings at CMS. And aggrieved parties may seek review of CMS's decisions under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq.

Private lawsuits challenging the adequacy of Medicaid reimbursements interfere with the ability of CMS and the States to manage this system. DHCS estimates that, since 2008, injunctions under § 30(A) have forced California to pay Medicaid providers more than $1.5 billion in excess payments that both CMS and DHCS have determined are unnecessary to ensure that beneficiaries have access to quality care and services under the Medicaid program. As a legal or practical matter, DHCS will likely never be able to recover from the providers who were overpaid. And these injunctions do not occur in a vacuum, but

instead have affected California's budgeting decisions during a severe fiscal crisis. When DHCS is forced by injunctions to divert more money than the law requires to one particular program, or even to a set of particular providers or services in that program, the State necessarily has less to spend on other important programs and services. This Court has cautioned against such "government by injunction," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974), and it should put an end to the system the court of appeals has created here.

ARGUMENT

THE SUPREMACY CLAUSE DOES NOT CREATE A PRIVATE RIGHT OF ACTION TO ENFORCE § 30(A) WHERE CONGRESS HAS NOT CREATED PRIVATELY ENFORCEABLE RIGHTS UNDER THAT STATUTE

I. The Supremacy Clause Does Not Supply a Cause of Action to Enforce the Terms of Cooperative Federal-State Programs Enacted Pursuant to Congress's Spending Power

This Court need not decide in the present case whether the Supremacy Clause may *ever* provide a private cause of action. This case can be resolved on the narrower ground that the Supremacy Clause does not provide a private cause of action to enforce a Spending Clause statute such as § 30(A) where

Congress chose not to create privately enforceable rights under that statute.

1. Spending Clause legislation of the sort at issue in this case is unique in that it "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Such legislation cannot be unduly coercive, and must offer the States "a legitimate choice whether to accept the federal conditions in exchange for federal funds." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602-2603 (2012).

Because of their quasi-contractual nature, such Spending Clause statutes do not "preempt" allegedly conflicting state laws in the ordinary sense. A state law that is preempted by federal law under the Supremacy Clause is "invalid." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). But where a State chooses not to participate in a cooperative program created by a Spending Clause statute, that is a lawful choice. The only consequence for the State is that it will not receive the federal funds attached to that federal statute. If a State chooses to participate, then it must of course comply with any condition that Congress validly imposes. But "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed

conditions is not a private cause of action for non-compliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst*, 451 U.S. at 28.

Indeed, the Medicaid Act specifically contemplates that States will not always be in clear compliance with all of the Act's provisions, and provides specific remedies that allow CMS to withhold and, if necessary, terminate funding if it believes a State is not complying. Thus, if she believes a State is failing to comply with any provision of the Medicaid Act, the Secretary of HHS, "after reasonable notice and opportunity for hearing," "shall notify [the appropriate] State agency that further payments will not be made to the State (or, in [her] discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure)," until "the Secretary is satisfied that there will no longer be any such failure to comply." 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Medicaid regulations provide for various repayment mechanisms when States are found not to be in compliance, *see* 42 C.F.R. §§ 430.33(c)(3), 430.35(d), 430.42(a), (h)(3), 430.48, and States that disagree with the Secretary's determination may request an administrative hearing, *id.* §§ 430.60 et seq., and ultimately seek judicial review under the APA, 5 U.S.C. § 701 et seq.

2. Using the Supremacy Clause to support private enforcement of this sort of Spending Clause legislation is also inappropriate for another reason: such statutes must clearly apprise States of the obligations they are taking on by accepting federal

funds. "There can, of course, be no knowing acceptance" of a Spending Clause "contract" "if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. By requiring Congress to "speak with a clear voice" and impose any conditions "unambiguously," "we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Here, neither § 30(A) nor any other Medicaid Act provision puts States on notice that by participating in the Medicaid program they could face private lawsuits brought by providers to challenge the adequacy of their payments – much less preliminary injunctions requiring the State to reimburse providers at higher rates than the State believes are required, under circumstances that make later recoupment effectively impossible, based on judicial construction of the Act's general terms uninformed by the expert judgment of the agency designated by Congress to administer and enforce the Act.

II. The Creation of a Private Right of Action to Enforce § 30(A) Would Frustrate Congress's Intent and Disrupt the State and Federal Governments' Ability to Manage State Medicaid Programs

1. Implying a private cause of action to enforce § 30(A) is inconsistent with the Medicaid Act's statutory framework and, in particular, Congress's decision to centralize enforcement authority in CMS. *See Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004); *Sanchez v. Johnson*, 416 F.3d

1051, 1059-1061 (9th Cir. 2005); *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1349 (2011) (holding that private enforcement of obligations owed by pharmaceutical companies to the federal government under Medicaid's 340B program would undermine Congress's intent for centralized enforcement). Private suits undermine the key benefits of a centralized administrative enforcement scheme: national uniformity, consistency, and predictability in interpretation and administration of federal law. Indeed, States in the Ninth Circuit have been subjected to onerous, judicially created requirements, purportedly under § 30(A), that apply nowhere else in the country and have no textual basis.[3] This is the antithesis of how the system is supposed to work. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring) (contrasting "the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking" with the "comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages").

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[3] For example, in this case the Ninth Circuit appears to have revived, at least to some degree, a procedural requirement that States conduct a certain type of "cost study" before reducing rates. Pet. App. 3-4 (citing *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1499 (9th Cir. 1997)). This atextual interpretation of § 30(A) has been rejected by HHS, every other circuit to consider the question, and a prior Ninth Circuit panel. *See Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1245-1250 (9th Cir. 2013).

In addition, regulation by litigation makes it virtually impossible for States to plan and budget their Medicaid obligations. As the system is supposed to work, the States communicate regularly with CMS, even obtaining guidance memoranda as issues arise.[4] Such communication reduces the likelihood that a State will guess incorrectly how CMS will interpret a Medicaid obligation and face substantial unplanned liabilities as a result. Litigation is far more unpredictable and less informed: DHCS's inability to predict how courts in the Ninth Circuit would misinterpret § 30(A) has cost its Medicaid program, in DHCS's estimate, well over $1.5 billion since 2008 in unanticipated and unnecessary expenses – exactly the result that the Court has explained should be avoided. *Pennhurst*, 451 U.S. at 17 ("[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."); *see also Schlesinger*, 418 U.S. at 222 (cautioning against "government by injunction").

Private lawsuits also interfere with, and disrupt, CMS's own enforcement procedures. This was vividly demonstrated in *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S. Ct. 1204 (2012),

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[4] In addition, providers and beneficiaries can, and often do, participate in the federal approval process, as contemplated by HHS regulations. *See* 42 C.F.R. §§ 430.76, 430.83, 430.86, 430.88; *see also Managed Pharmacy Care*, 716 F.3d at 1242-1243 (discussing the "extensive input" CMS received from providers in considering whether to approve DHCS's state plan amendments).

where the underlying preliminary injunctions materially altered and prejudiced California's ability to obtain CMS approval of its proposed state plan amendments (SPAs). In those cases, CMS initially denied all of California's SPAs citing, *inter alia*, concern about the destabilizing effect on access to services if providers were required to repay funds disbursed pursuant to the pending injunctions. *See* Brief for the United States as Amicus Curiae, App. 3a, *Douglas*, S. Ct. No. 09-958 (filed Dec. 3, 2010) ("Additionally, CMS is concerned that, given the time that has elapsed since these SPAs were submitted, the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate access concerns."). When CMS subsequently approved California's SPAs, finding that the proposed rate reductions were in fact consistent with the § 30(A) factors, CMS nonetheless required the State to give up all but approximately three months of its claims for retroactive recoupment, based on concerns that cumulatively approving recoupment for the entire time that the erroneously issued injunctions were in effect could harm providers and beneficiaries. *See* Letter from the United States, *Douglas*, S. Ct. No. 09-958 (filed Oct. 28, 2011); Petitioners' Supplemental Letter Brief, *Douglas*, S. Ct. No. 09-958 (filed Nov. 18, 2011).

2. Congress's belief that the Medicaid Act should not allow private suits challenging the adequacy of Medicaid payments is further demonstrated by its repeal of the Boren Amendment following *Wilder v.*

Virginia Hospital Association, 496 U.S. 498 (1990). In *Wilder*, the Court held that the Boren Amendment conferred a "right" on providers, enforceable under 42 U.S.C. § 1983, to "reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility." *Id.* at 509-510. *Wilder* sparked a nationwide explosion of provider lawsuits challenging the adequacy of state Medicaid rates.[5]

Congress responded by repealing the Boren Amendment in 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-508 (1997). In so doing, Congress repeatedly expressed its intent to eliminate private lawsuits in order to give the States more flexibility in setting Medicaid rates and to reduce Medicaid costs. A House committee report stated:

> A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations.[¶]. It is the Committee's intention that, following enactment of this Act, *neither this nor*

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[5] *See, e.g.*, *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306 (2d Cir. 1991); *Erie County Geriatric Ctr. v. Sullivan*, 952 F.2d 71 (3d Cir. 1991); *Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991); *Abbeville General Hosp. v. Ramsey*, 3 F.3d 797 (5th Cir. 1993); *Ill. Health Care Ass'n v. Bradley*, 983 F.2d 1460 (7th Cir. 1993); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536 (10th Cir. 1994).

> *any other provision of Section 1902* [of the Social Security Act, i.e., 42 U.S.C. § 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities relative to the adequacy of the rates they receive.

H.R. Rep. No. 105-149, at 590-591 (1997) (emphasis added); *see also* 143 Cong. Rec. S6301-02, S6305 (1997) (statement of Sen. Domenici) ("Provide flexibility instead of the rigidity brought on by lawsuits. The Boren amendment should be dead."). The Congressional Budget Office had estimated that Boren's repeal would reduce Medicaid spending by about $1.2 billion from 1998 to 2002 – an estimate that "assumes that reimbursement rates for institutional providers would increase more slowly than if providers could continue to use the threat of Boren suits as leverage against the states." H.R. Rep. No. 105-149, at 625.[6]

---

[6] *See also* 143 Cong. Rec. at S6305 (statement of Sen. Gramm) ("The Boren amendment has produced endless lawsuits. States want to negotiate with hospitals and get the best rate they can. Repealing the Boren amendment takes it out of the courts."); 143 Cong. Rec. S6058-04, S6068 (1997) (statement of Sen. Roth) (repeal of Boren Amendment "will take the providers and the States out of the Federal courts and put them back at the contract negotiating table"); 142 Cong. Rec. S5305-05, S5355 (1996) (statement of Sen. Chafee) (repeal "will allow States to establish their own reimbursement rates and free them from much of the litigation that now exists").

3. Private lawsuits to enforce § 30(A) under the Supremacy Clause have improperly disrupted California's ability to manage its $90 billion Medicaid program. Every decision relating to provider payments is potentially subject to private challenges seeking injunctions that mandate additional payments or prohibit reductions based on judicial second-guessing of the State's rate-setting process. DHCS estimates that since *ILC I* was decided in 2008, injunctions issued based on the Ninth Circuit's erroneous interpretation of § 30(A) have cost the State more than $1.5 billion.

In balancing budgets with diminishing resources, state elected officials must carefully consider hundreds of competing demands and priorities. In States like California, budget adjustments are typically a zero-sum process. California is required under its Constitution to balance its budget, *see* Cal. Const. art. IV, § 12(a) & (g), and has limited means of raising revenue. For example, neither taxes nor fees producing general revenue can be raised without a vote of the people or a two-thirds vote of the Legislature. *See* Cal. Const. art. XIIIA, § 3(a). Thus, when injunctions improperly prevent a state agency such as DHCS from implementing appropriate, legally permissible cost reductions in one area, the Legislature often has no choice but to cut the funding of other important programs.

From approximately 2008 to 2012, California faced an unprecedented budget crisis from which it is still recovering. In fiscal year 2011-2012, for example, the State faced a $26.6 billion budget gap, and the Legislature was forced to cut $15 billion from schools, universities, public-safety programs, welfare services, courts, parks, and dozens of other important programs, including Medicaid. Revenue shortfalls in December 2011 triggered an additional $1 billion in further cuts, eliminating funding for school bus transportation, local libraries, and criminal-prosecution grants, and further reducing funding for schools, universities, community colleges, child-care programs, and California's Medicaid in-home supportive services program.

During the recent budget crisis, the Legislature initially looked for ways to reduce Medicaid expenditures without affecting services to beneficiaries. The State identified areas where a sufficient number of providers could absorb a modest payment reduction and still be willing to participate in the Medicaid program. *See, e.g.*, *Managed Pharmacy Care*, 716 F.3d at 1242; Cal. Welf. & Inst. Code § 14105.192(a)(2), (m), (o)(1); *id.*, § 14105.19 (2008). When these rate reductions were enjoined by the courts, the State was forced to divert scarce resources from other programs and services – and in some instances, eliminate certain optional Medicaid services to beneficiaries, *see* Cal. Welf. & Inst. Code § 14131.10 – in order to pay higher reimbursements to Medicaid providers.

In nearly every case in which a California rate reduction was initially enjoined based on the Ninth Circuit's unique interpretation of § 30(A), both DHCS and CMS – the state and federal agencies with subject matter expertise in all things Medicaid – ultimately determined that the proposed reductions complied with § 30(A) and would not impair beneficiary access to services. *See, e.g.*, *Douglas*, 132 S. Ct. at 1209; *Managed Pharmacy Care*, 716 F.3d at 1243. Yet, as either a legal or a practical matter, there was and likely will be no way for DHCS to recoup the money it was improperly forced to spend.

For all these reasons, recognizing a private right of action under the Supremacy Clause to enforce § 30(A) would frustrate Congress's intent in designing the Medicaid program and improperly disrupt the ability of state and federal administrators to work together to manage the program as it is appropriately implemented in each State.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RICHARD ARMSTRONG, *et al.*,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

This is such a case. The Supremacy Clause of the Constitution, which guarantees that federal law "shall be the supreme Law of the Land," U.S. Const. art. VI, cl. 2, serves a vital role in our national economy by protecting federal laws and programs against interference by subordinate governments—thereby eliminating the burdens that such interference places on individuals and businesses. The Chamber's members thus depend on the robust enforcement of the Supremacy Clause to protect against state and local mandates that interfere or conflict with federal law. In this case, petitioners seek to weaken or eliminate a significant, time-tested method for such enforcement: the cause of action for

---

[1] No counsel for any party to these proceedings authored this brief, in whole or in part. No entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and Respondents have consented to the filing of this brief. Letters reflecting such consent have been filed with the Clerk.

equitable relief arising directly under the Supremacy Clause.

The Chamber has relied on this cause of action in seeking to vindicate the interests of its members. See, *e.g.*, *Am. Trucking Ass'ns* v. *City of L.A.*, 133 S. Ct. 2096 (2013); *Chamber of Commerce of the United States* v. *Whiting*, 131 S. Ct. 1968 (2011); *Chamber of Commerce of the United States* v. *Brown*, 554 U.S. 60 (2008). It also frequently supports such suits as an *amicus curiae*. See, *e.g.*, *Douglas* v. *Indep. Living Ctr. Of S. Cal., Inc.*, 132 S. Ct. 1204 (2012); *Rowe* v. *N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Pharm. Research & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644 (2003) (*PhRMA*); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992). Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court correctly resolves the important issue presented here.

STATEMENT

Two centuries of this Court's precedents support a right of action to enjoin state legislation that is invalid under the Supremacy Clause. *E.g.*, Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts & The Federal System* 903 (5th ed. 2003) (*Hart & Wechsler*). Petitioners and their *amici* offer no persuasive reason why the availability of preemption claims arising under the Supremacy Clause should now be called into question.

They nevertheless argue that, even if these claims exist generally, they should be disallowed in this particular case because the federal Medicaid statute claimed to have been violated does not confer a private right of enforcement. Petrs. Br. 13-15; U.S.

Br. 8-10. The claims in this case do not, however, seek to "enforce" the statute, or to assert rights granted thereunder. Rather, they seek to vindicate the structural, constitutional interest in the supremacy of national laws. That interest is enforceable in the federal judiciary as a matter of constitutional law, as this Court has "long ... recognized." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001); see also *Bond* v. *United States*, 131 S. Ct. 2355, 2364-66 (2011). Statutory enforcement procedures may provide alternative (and often expanded) means by which state violations of federal law can be addressed, but those procedures do not displace a right of action for equitable relief under the Supremacy Clause.

SUMMARY OF THE ARGUMENT

The claims in this case, to enjoin Idaho from enforcing preempted state law, are supported by a long and unbroken line of precedent recognizing an equitable right of action under the Constitution to address ongoing constitutional violations. *E.g.*, *Malesko*, 534 U.S. at 74. There is no basis to weaken or eliminate the constitutional cause of action which these claims, and many others like them, raise.

1. It is "well-established" that the Constitution itself supports a right of action seeking prospective equitable relief to address constitutional violations. *Hart & Wechsler*, *supra*, at 903. Scores of this Court's opinions have recognized such claims, and never has this Court suggested that this constitutional right of action depends for its existence on congressional authorization. *Infra* Part I. Such a prerequisite would be inconsistent with this Court's approach to other structural constitutional provisions that, like the Supremacy Clause, always have been understood to support claims for prospective equitable relief

without need for an authorizing statute. *E.g.*, *S.-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 87 (1984); see also *Bond*, 131 S. Ct. at 2364-66.

Reaffirming the longstanding recognition of this constitutional right of action would not be an "'end run'" (Petrs. Br. 19) around this Court's decisions requiring "rights-creating" language as a precondition to statutory causes of action. *Infra* Part I.C.2. Claims seeking to enforce a *statute*, whether 42 U.S.C. § 1983 or any other, arise under the statute and thus are available only when authorized thereby. *E.g.*, *Golden State Transit Corp.* v. *City of L.A.*, 493 U.S. 103, 106 (1989). Claims seeking to enforce the *Constitution*, by contrast, arise as a necessary incident of the constitutional structure. *E.g.*, *S.-Cent. Timber*, 467 U.S. at 87; see also *Golden State*, 493 U.S. at 116-17 (Kennedy, J., dissenting); *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 733 n.3 (1979) (Powell, J., dissenting). Whatever role Congress may have in crafting adjudicatory mechanisms and remedies for constitutional claims, the Constitution itself empowers the judiciary to entertain suits alleging ongoing constitutional violations, including violations of the Supremacy Clause, and to abate them when appropriate through prospective equitable relief.

2. This right of action is no less available when the preemption claim implicates a federal statute enacted under authority of the Spending Clause. *Infra* Part II.A. The constitutional basis for the federal statute has never been held relevant to an inquiry into whether a state law is preempted, or to the antecedent question of whether a cause of action is available. To the contrary, this Court repeatedly has upheld equitable relief on claims that alleged a conflict between state legislation and requirements of

federal spending programs. See, *e.g.*, *Blum* v. *Bacon*, 457 U.S. 132, 145-46 (1982).

The possibility that federal funding might be withdrawn does not eliminate individual preemption claims. *Infra* Part II.B. So long as the State participates in the federal program, it is subject to the conditions imposed by federal law, and conflicting state legislation is void whether or not it is "possible" that the conflict might be avoided by a future change in circumstances. *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579 (2011). Regardless of what remedies might be available to the federal government to vindicate its own interest in enforcing federal law, individuals and businesses injured by unconstitutional state legislation retain the right to seek prospective equitable relief in federal court.

ARGUMENT

I. THE SUPREMACY CLAUSE SUPPORTS A PRIVATE RIGHT OF ACTION TO ENJOIN PREEMPTED STATE LEGISLATION.

It has long been accepted, as the United States acknowledges, U.S. Br. 15-17, that the Supremacy Clause supports a claim for individuals and businesses to challenge preempted state legislation. *Hart & Wechsler*, *supra*, at 903; see also 13D Charles A. Wright et al., *Federal Practice and Procedure* § 3566, at 289-92 (3d ed. 2008). That principle, although disputed by petitioners, Petrs. Br. 35-39, accords with the original understanding of the Supremacy Clause, and two centuries of caselaw thereafter, as well as this Court's decisions in statutory rights cases.

A. A Preemption Claim Arising Directly Under The Supremacy Clause Is Consistent With Original Understanding.

There is no evidence that the Framers would have thought that individuals adversely affected by preempted state legislation would be unable to seek equitable relief from the federal judiciary. To the contrary, the historical record suggests that they expected and intended such a right of action to be available.

1. The Framers' principal objective in crafting the Supremacy Clause was to establish an effective mechanism by which States could be compelled to comply with federal law. Christopher R. Drahozal, *The Supremacy Clause* 6-7 (2004); see also, *e.g.*, 3 *The Records of the Federal Convention of 1787*, at 524-29 (Farrand ed. 1911) (Farrand). Although the Articles of Confederation had declared the principle of national supremacy and directed the States to "abide by" and "inviolably observe[ ]" national law, Art. of Confed., art. XIII, they provided no method to enforce that principle, with the result that several States enacted legislation or exercised powers (such as negotiating treaties with foreign countries) in direct contravention of national law. Drahozal, *supra*, at 6-7; see also James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison* 345, 348-58 (1975).

To remedy this defect, each plan offered at the Constitutional Convention would have given authority to one or more branches of the federal government to invalidate state legislation that was inconsistent with national policy—and, when necessary, to compel compliance. See 3 Farrand, *supra*, at 524-29; see also Drahozal, *supra*, at 6-7. For instance, one plan, offered by the delegates from

New Jersey, would have allowed the executive to call forth the military against a recalcitrant State, 1 Farrand, *supra*, at 245; another, associated with the Virginia delegation, would have vested in Congress the power to "negative" state legislation deemed inconsistent with national law, *id.* at 21, 54, 164-65. The proposal ultimately adopted, embodied in the Supremacy Clause, shared the same purpose as other plans but delegated responsibility for enforcing national supremacy to the judiciary. *E.g.*, *id.* at 168, 313, 322; 2 Farrand, *supra*, at 28-29, 144, 169, 183, 389-91, 417, 603; see also 3 Farrand, *supra*, at 524-29; Drahozal, *supra*, at 20-23.

A private right of action to challenge preempted state legislation is necessary to allow the judiciary to satisfy this constitutional purpose. State legislation can be presented to federal courts only in the context of "cases" or "controversies," *e.g.*, 2 Farrand, *supra*, at 430, and the parties most able to bring these cases—in modern terms, those with "standing"—are those adversely affected by the state legislation. See, *e.g.*, David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 401-03 (2004). Without a right of action, there would be no mechanism by which unconstitutional state laws could be addressed, except where the State itself elected to bring an enforcement action in the courts, thereby implicating the Supremacy Clause as a defense.

It is inconceivable, given the Framers' then-recent experience under the Articles of Confederation, *e.g.*, 1 Farrand, *supra*, at 166-67, 316-17, 326, that they would have intended the enforcement of national supremacy to depend on voluntary action by the States. Nor would they likely have viewed the Supremacy Clause as nothing more than a "rule of

decision," Petrs. Br. 36, directing States to follow national law—as had the Articles previously—but giving the federal courts no actual authority to invalidate unconstitutional state legislation. See, *e.g.*, James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 762 (1998). The Framers understood and intended that the federal judiciary would be open to individuals injured by unconstitutional state legislation and empowered to declare state legislation invalid and to prospectively enjoin its enforcement. See, *e.g.*, Marsha S. Berzon, *Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. Rev. 681, 706-07 (2009).

2. This understanding is reflected in the Convention and ratification debates. Throughout those proceedings, the Supremacy Clause was consistently described as giving judges authority affirmatively to "set aside" and "declare void" (not merely "decline to enforce") state legislation that contravenes federal law. *E.g.*, 2 Farrand, *supra*, at 27-28, 391. Although constitutional remedies and rights of action were not a focus of the Convention, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991), several delegates expressed the understanding that the federal judiciary should entertain claims by "any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State," 3 Farrand, *supra*, at 55-56 (Randolph), and that federal judges, when presented with an unconstitutional state law, would be able to grant prospective equitable relief in the form of a

"supersedeas," *id.* at 524-29 (Madison).[2] During the ratification debates, both supporters and opponents of the Constitution assumed that the *federal* judiciary would be empowered "in the first instance" to decide the constitutionality of state laws—presumably in actions commenced by individuals, as it would have been unlikely for a State to bring an enforcement action in federal court. *Id.* at 286-87; see also *id.* at 205-07; 3 *The Debates in the Several State Conventions on the Adoption of the Constitution* 266 (Jonathan Elliot ed., 2d ed. 1836).

This is consistent with the views set forth in *The Federalist Papers*. Petitioners' *amici* rely (Br. of Nat'l Gov. Ass'n 21-22) on a statement by Alexander Hamilton that the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a federal government." *The Federalist No. 33* (Hamilton). But Hamilton never suggested that this "truth" was an unenforceable one. On the contrary, given the views expressed elsewhere by both Hamilton and Madison, this statement suggests that they understood a right of action to challenge unconstitutional state statutes to be inherent in the constitutional structure, just as they understood the right of judicial review of federal legislation to be inherent in that same structure. See *The Federalist No. 44* (Madison); *The Federalist No. 80* (Hamilton).

This understanding fits squarely within contemporary legal practice. At the time of the

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[2] The proposal by Edmund Randolph would have allowed the judiciary to invalidate not only state legislation found to be inconsistent with federal law but also any state laws deemed "contrary to the principles of equity and justice." 3 Farrand, *supra*, at 55-56; *see also* 1 Farrand, *supra*, at 97-98; 2 Farrand, *supra*, at 73-80.

Founding, colonial and English judicial practice permitted individuals to seek redress in equity for injuries resulting from an *ultra vires* act or void law. Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 437-50 (2003).[3] For example, the English Board of Trade accepted and addressed petitions from colonists challenging local acts as inconsistent with English law. *E.g.*, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 50-52 (1915). The English Privy Council adjudicated appeals by colonists alleging that local provisions were "repugnant" to English law. *E.g.*, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Pol. Sci. Q. 279, 287-88 (1913). Petitioners' *amici* seek to downplay these procedures as "fundamentally political and administrative in nature," Br. of Nat'l Gov. Ass'n 15, but do not explain why these analogous practices would not have informed the Framers' understanding of the role of the judiciary in reviewing local legislation. *E.g.*, 1 Farrand, *supra*, at 105, 138-40; 2 Farrand, *supra*, at 73-80 (referring to English practice in addressing judicial review).

B. This Court Has Consistently Recognized Preemption Claims Under The Supremacy Clause.

Consistent with this understanding, for nearly 200 years the Court has addressed claims seeking equitable relief against the operation of a preempted state law. *Hart & Wechsler*, *supra*, at 903. There are

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[3] *See generally* Erwin C. Surrency, *Report on Court Procedures in the Colonies* (1700), *reprinted in* 9 *American Journal of Legal History* 167, 176 (1965); 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (14th ed. 1918).

scores of such cases in this Court alone, just a sampling of which are set forth in the margin,[4] and in the federal courts of appeals.[5] These cases were

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[4] *See, e.g.*, *Am. Trucking*, 133 S. Ct. 2096; *Rowe*, 552 U.S. 364; *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268 (2006); *PhRMA*, 538 U.S. 644; *Gade*, 505 U.S. 88; *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Ray* v. *Atl. Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Perez* v. *Campbell*, 402 U.S. 637 (1971); *Fla. Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942); *Mintz* v. *Baldwin*, 289 U.S. 346 (1933); *Clallam Cnty.* v. *United States*, 263 U.S. 341 (1923); *Cummings* v. *City of Chi.*, 188 U.S. 410 (1903); *R.R. Co.* v. *Peniston*, 85 U.S. (18 Wall.) 5 (1873); *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824); *cf. Dobbins* v. *Comm'rs of Erie Cnty.*, 41 U.S. (16 Pet.) 435 (1842); *Weston* v. *City Council*, 27 U.S. (2 Pet.) 449 (1829); *Soc'y for the Propogation of the Gospel* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1 (1820).

[5] *See, e.g.*, *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006); *CSX Transp., Inc.* v. *Williams*, 406 F.3d 667, 672-74 (D.C. Cir. 2005) (per curiam); *Planned Parenthood of Houston & Se. Tex.* v. *Sanchez*, 403 F.3d 324, 330-35 (5th Cir. 2005); *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004); *Verizon Md., Inc.* v. *Global NAPS, Inc.*, 377 F.3d 355, 368-69 (4th Cir. 2004); *Local Union No. 12004* v. *Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277-78 (11th Cir. 2003) (en banc); *Ill. Ass'n of Mortgage Brokers* v. *Office of Banks & Real Estate*, 308 F.3d 762, 765 (7th Cir. 2002); *GTE N., Inc.* v. *Strand*, 209 F.3d 909, 916 (6th Cir. 2000); *Elizabeth Blackwell Health Ctr. For Women* v. *Knoll*, 61 F.3d 170, 185 (3d Cir. 1995); *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 776 n.3 (8th Cir. 1990). *But see Planned Parenthood of Kan. & Mid-Mo.* v. *Moser*, 747 F.3d 814, 822-23 (10th Cir. 2014) (rejecting, in a panel decision, circuit precedent recognizing right of action under Supremacy Clause).

decided in each critical period in the evolution of enforcing constitutional claims against state actors—including, among others, the eras shortly after the Founding; before and after the Civil War and the enactment of § 1983; and throughout the Twentieth Century, both before and after this Court's decisions in statutory rights cases such as *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002) and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

As early as 1824, in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court held that an entity could seek equitable relief against a state official acting under a state law preempted by the Supremacy Clause. *Id.* at 838. The Court expressly rejected the argument (similar to that offered by petitioners here, Petrs. Br. 36-39) that an individual who "perceives the approaching danger" of an invalid state law "can obtain no protection from the judicial department of the government." 22 U.S. (9 Wheat.) at 847. This Court instead held that it is the "province of [the judiciary], in such cases, to arrest the injury, and prevent the wrong." *Id.* at 845, 847.

Subsequent cases continued to adjudicate claims for equitable relief directly under provisions of the Constitution, including the Supremacy Clause. See *supra* note 4. These include, among others, the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), which upheld an individual's claim to enjoin state officials from enforcing an unconstitutional state law. *Id.* at 145-65. Indeed, the decision went out of its way to note the long history of such claims in the federal courts. *Id.* at 145-52.[6] And, of course,

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[6] *See also Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 75-80 (1831) (Thompson, J., dissenting) (a claim for equitable relief against a preempted state law "presents a case for judicial

the very purpose of *Young* was to preclude States from deterring potential plaintiffs from protecting their constitutional rights by threatening to penalize them for non-compliance with the State's unconstitutional requirement. See *id.* By holding that the private party could go to court to enforce the Constitution against state officials, this Court rejected the argument that constitutional provisions are enforceable only as a defense to an enforcement action.

Through the last century and into this one, and despite changing views of the meaning and relevance of the phrase "cause of action," *e.g.*, *Davis* v. *Passman*, 442 U.S. 228, 236-44 (1979), this Court repeatedly has entertained affirmative claims to enjoin state officials from implementing preempted state legislation. *E.g.*, *Verizon Md. Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1638-39 (2011).[7] In *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), for example, the Court held that "[a] plaintiff who seeks injunctive relief from state regulation[ ] on the ground that such regulation is pre-empted [under] the Supremacy Clause ... presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.* at 96 n.14. These decisions "reaffirm[ ] the general rule" that equitable relief is available in

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consideration, arising under the laws of the United States," and "an injunction is a fit and proper writ to be issued, to prevent the further execution of such [state] law[ ]").

[7] *See also supra* note 4; Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347 (1909); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930).

federal court to enjoin state officers from implementing preempted state law. *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985).

To be sure, many of these decisions assumed the existence of a claim under the Supremacy Clause, while focusing directly on questions of jurisdiction or the like. See, *e.g.*, *Swift & Co.* v. *Wickham*, 382 U.S. 111, 114-29 (1965). But, it cannot be disputed that these cases reflect an unbroken history of allowing individuals to "vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts." *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); cf. *Vt. Agency of Natural Res.* v. *U.S. ex rel. Stevens*, 529 U.S. 765, 773-78 (2000) (concluding that the "long tradition" of "routinely entertain[ing]" *qui tam* actions was "well nigh conclusive" of those claims' justiciability). To hold otherwise would cast doubt upon, if not directly overrule, the holdings of these cases and scores others. What this history also reveals is that a direct action under the Supremacy Clause has promoted rather than interfered with a properly functioning federalist regime because preemption requires clear intent to oust state law, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312, 334 (2008), but when it exists there is a remedy available to the party injured by that law.

C. Statutory Authorization Is Not A Prerequisite To A Preemption Claim Under the Supremacy Clause.

In none of the cases discussed above did this Court demand "rights-creating" or other authorizing statutory language as a prerequisite to a right of action under the Supremacy Clause. See *supra* note 4. Such a requirement would run counter to a large corpus of cases approving direct claims under other

provisions of the Constitution and is not mandated by statutory rights cases such as *Gonzaga* and *Sandoval*.

1. Constitutional Claims For Equitable Relief Do Not Require Statutory Authorization.

Claims arising directly under provisions of the Constitution have "long been recognized" by this Court, without need for statutory authorization. *Malesko*, 534 U.S. at 74. Whatever role Congress has in defining and limiting the scope of remedies that are available in these actions, particularly with respect to monetary damages, a claim seeking purely equitable relief to abate an ongoing constitutional violation arises as a necessary incident of the Constitution.

a. This principle underlies *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny. That case, and those that followed from it, held that an individual whose constitutional rights are infringed by a federal official may bring an action in federal court for monetary damages. *Id.* at 392-97; see also *Carlson* v. *Green*, 446 U.S. 14, 19-21 (1980); *Davis*, 442 U.S. at 245-49. No statute authorized these actions, and in some cases Congress had provided alternative remedial schemes for the violations at issue. *E.g.*, *Green*, 446 U.S. at 19-21. Nevertheless, this Court reasoned that a damages remedy should be available to individuals injured by constitutional violations committed by federal officials, in part because 42 U.S.C. § 1983 provides a comparable remedy for violations committed by state officials. *Id.* at 21-22 & n.6, 24-25.

The availability of a *damages* remedy for constitutional claims has, of course, been circumscribed in the years since *Bivens*, and for good reasons. *E.g.*, *Malesko*, 534 U.S. at 68. A damages remedy is retrospective in nature, intended to compensate the injured party and deter future violations, and is not strictly necessary to abate an ongoing constitutional violation. *Green*, 446 U.S. at 19-21. For those reasons, the Court generally has limited it to circumstances in which the violation could not otherwise be addressed, and has held it unavailable when Congress provided a "meaningful" and "effective" alternative remedial scheme—even if the relief available under that scheme is not precisely the same. *E.g.*, *Schweicker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 385-86 (1983); see also *Hui* v. *Castaneda*, 559 U.S. 799, 808 (2010).

The Court consistently has reaffirmed, however—even when disallowing a damages claim under *Bivens*—that claims for equitable relief remain fully available. *Malesko*, 534 U.S. at 74; *United States* v. *Stanley*, 483 U.S. 669, 682-83 (1987); see also, *e.g.*, *Green*, 446 U.S. at 39 (Rehnquist, J., dissenting). Such claims exist and retain their vitality as a matter of constitutional structure and necessity. See *Stanley*, 483 U.S. at 683 (claims for equitable relief "[do] not ask the Court to imply a new cause of action") (quoting *Chappell* v. *Wallace*, 462 U.S. 296, 305 n.2 (1983)). While Congress may by statute prescribe procedures for the adjudication and review of constitutional claims, see, *e.g.*, *Swift*, 382 U.S. at 114-15 (three-judge panels), and justiciability doctrines may independently restrict their availability in particular circumstances, see, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), prospective equitable

relief is "presumed availab[le] ... against threatened invasions of constitutional interests." *Bivens*, 403 U.S. at 404 (Harlan, J., concurring).

b. Cases outside the *Bivens* context likewise recognize "direct" constitutional claims seeking equitable relief for violations of the Constitution. *Malesko*, 534 U.S. at 74. Contrary to petitioners' argument, these claims have been approved not only for constitutional provisions that represent an affirmative "source of ... federal rights," Petrs. Br. 37, but also those—like the Supremacy Clause—that define the structural relationship between the state and federal governments.

In fact, there are numerous cases in which this Court has addressed claims arising directly under "structural" provisions of the Constitution. These include, among others, claims under the Qualifications and Compact Clauses, *e.g.*, *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 458 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969), as well as under more abstract constitutional principles such as separation of powers, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952).[8] These cases confirm that "structural" provisions of the Constitution, no less than "rights-creating" ones, are enforceable through direct actions in federal courts.

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[8] *See also, e.g.*, *Hodel* v. *Irving*, 481 U.S. 704 (1987) (Takings Clause); *S.-Cent. Timber*, 467 U.S. 82 (Dormant Commerce Clause); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (Contracts Clause); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1 (1928) (Dormant Commerce Clause); *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112 (1896) (Takings Clause); *Davis* v. *Gray*, 83 U.S. (16 Wall.) 203 (1873) (Contracts Clause).

This principle was strongly reaffirmed in a pair of this Court's recent decisions. In *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), the Court expressly upheld "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles." *Id.* at 491 n.2. It noted that a right to equitable relief for a constitutional violation "has long been recognized" and "[exists] as a general matter, without regard to the particular constitutional provisions at issue." *Id.* (quoting *Malesko*, 534 U.S. at 74).

In *Bond* v. *United States*, 131 S. Ct. 2355 (2011), this Court similarly held that "structural" constitutional provisions like the Tenth Amendment—which do not confer individual "rights" but rather define the relationship between federal and state governments—are nevertheless intended to "protect[ ] the liberty of ... persons" and for that reason may be asserted by an individual in a challenge to government action. *Id.* at 2364-65. In language particularly relevant here, the Court explained that, "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or check-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism." *Id.*

These opinions reject the distinction that petitioners would draw between rights-creating and structural provisions of the Constitution. Petrs. Br. 17-19. On the contrary, they properly recognize that the Constitution's structural provisions fundamental purpose is to protect individual liberties. *Bond*, 131 S. Ct. at 2363-64. That is equally true of the

Supremacy Clause. The Court's decisions also explicitly recognize that negative restrictions on governmental power, like the Supremacy Clause, can support a challenge against government action and a claim for prospective equitable relief to abate an ongoing constitutional violation. *Free Enter.*, 561 U.S. at 491 n.2. In arguing that the Supremacy Clause "should be treated differently than every other constitutional claim," petitioners—like the parties in *Free Enterprise* and *Bond*—"offer[ ] no reason and cite[ ] no authority why that might be so." *Id.* That is because no reason exists.

2. The Analysis Applied In Statutory Right Of Action Cases Does Not Apply To Constitutional Claims.

"Rights-creating" language is not a prerequisite to claims asserted directly under the Constitution, including preemption claims under the Supremacy Clause. That requirement is applied to claims under 42 U.S.C. § 1983, see *Gonzaga*, 536 U.S. at 282, and claims implied under federal statutes, see *Sandoval*, 532 U.S. at 286, but it has never been—and, contrary to petitioners' argument, Petrs. Br. 18-19, cannot be—applied to constitutional claims.

a. The remedy provided by § 1983 has, since its enactment, been understood to supplement and complement—but not to supplant—equitable relief already available through a claim under the Constitution itself. *E.g.*, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1154, 1170 (1977); see also *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961). Throughout the debates on the bill that would become § 1983, legislators explained that the statute would offer "*further* redress for violations ... of constitutional rights" and an "*additional*" remedy for individuals injured thereby. Cong. Globe, 42d Cong.,

1st Sess. app. 315, 460 (1871) (emphasis added); see, *e.g.*, *id.* at 374, 429, 653. There is no evidence that Congress intended § 1983 to limit or disturb the traditional scope of preemption claims under the Supremacy Clause. To the contrary, supporters and opponents of the bill recognized the historical propriety of claims seeking prospective injunctive relief for constitutional violations, including actions to void unconstitutional state laws. *E.g.*, *id.* at app. 259 ("[T]he remedy [for a State's violation of the Constitution is that t]he Federal courts ... declare[ ] the statute null and void."); see also, *e.g.*, *id.* at app. 83, app. 221, app. 259, app. 315, 429.

This distinction finds further support in the fact that § 1983 was deemed necessary precisely because it addressed a different class of harms—injuries to federally conferred "rights"—than those remedied by a claim for injunctive relief under the "negative limitations" of the Constitution. *Id.* at app. 83. As one of the bill's sponsors explained:

> [Constitutional] prohibitions upon the political powers of the States are all of such nature that they can be ... enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" those provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.... [T]hese [are] the only provisions where it was deemed that legislation was required to enforce the[m] ....

Id. at app. 69; see also *id.* at app. 70. Prospective equitable relief often is not an effective remedy for a completed infringement of an individual's personal

"rights," and for that reason a damages remedy was provided in § 1983, both to compensate the individual and to deter future violations.[9] *E.g.*, *id.* at app. 50.

This rationale has been understood to justify limiting claims under § 1983 (and analogous claims under *Bivens*) to deprivations of federally conferred "rights," *Gonzaga*, 536 U.S. at 285-90, but it has no application to direct constitutional claims for prospective equitable relief. Whereas § 1983 by its terms protects only "rights" guaranteed to individuals under federal law, *id.*, the Supremacy Clause declares broadly that "any Thing in the Constitution or Laws of any State" contrary to the "Constitution[ ] and the Laws of the United States" shall be invalid, without regard to whether the provisions at issue confer "rights." U.S. Const., art. VI, cl. 2; see *Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) ("Pre-emption [does not] concern[ ] ... the securing of rights, privileges, and immunities to individuals.").

To be sure, as the United States points out, *some* preemption claims might also be brought under § 1983 because they implicate a particular "right" guaranteed by federal law. U.S. Br. 28-29. But the availability of that particular avenue of relief is no reason to hold that § 1983 displaces constitutional

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[9] The three statements cited by petitioners' *amicus*, far from showing that the framers of § 1983 "believed that its equitable remedies were *new*," Br. of Nat'l Gov. Ass'n 33, establish only that they believed that equitable remedies, in addition to monetary damages, could and should be provided under § 1983 to protect against a violation of federally guaranteed "rights." *See* Cong. Globe, 42d Cong., 1st Sess. at 501 (noting that Congress has authority to enact § 1983, to provide "an original action in our Federal courts [for an] injunction [or] recovery of damages"); *see also id.* at 577 (referring to need to protect federally guaranteed "rights"); *id.* at 376 (same).

preemption claims, any more than it displaces the myriad other constitutional claims that "ha[ve] long been recognized" to coexist with § 1983 (and *Bivens*) claims.[10] *Malesko*, 534 U.S. at 74. And, contrary to the United States' assertion, U.S. Br. 28-29, not all constitutional preemption claims could simply be restyled as § 1983 claims, or vice versa. See, *e.g.*, *Golden State*, 493 U.S. at 107-08; *Loyal Tire & Auto Ctr., Inc.* v. *Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006). There is no basis to restrict preemption claims under the Supremacy Clause to those based on a "rights-creating" statute.

b. Much the same can be said for petitioners' argument that constitutional preemption claims should be allowed only when authorized by the underlying federal statute, under the rationale of implied rights of action cases like *Sandoval*. Petrs. Br. 18-35. Because the claims at issue in those cases were brought directly under *statutes*, the scope and availability of any cause of action depended on the statute itself. *E.g.*, *Sandoval*, 532 U.S. at 286. Claims under the Supremacy Clause, by contrast, are brought under *the Constitution* and exist as a necessary incident of the Constitution's structure. See, *e.g.*, *Free Enter.*, 561 U.S. at 491 n.2; see also *Malesko*, 534 U.S. at 74.

Petitioners' position rests on the flawed premise that a preemption claim seeks to "enforce" a federal statute. *E.g.*, Petrs. Br. 24-27; U.S. Br. 30. Although

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[10] The statement in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that when a statute provides no private right of enforcement § 1983 represents the "exclusive statutory cause of action," *id.* at 6, does not on its face suggest that § 1983 is the exclusive vehicle for *non-statutory* claims, *contra* Petrs. Br. 24-25; U.S. Br. 25-26, and *Thiboutot* never has been read to support displacement of constitutional claims for equitable relief.

a preemption claim commonly relies for its substance on the scope of a federal statute—to determine, for instance, whether the challenged state legislation impermissibly conflicts with federal law, see *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485-86 (1996)—it does not seek to "enforce" the statute, as would a claim asserting an implied statutory right of action, *Sandoval*, 532 U.S. at 286. Rather, what is "enforced" in a preemption claim is the structural constitutional principle of supremacy, as declared in the Supremacy Clause. *E.g.*, *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 271-72 (1977) (preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"); see also Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 234 (2000).

It is therefore no answer to contend, as petitioners do, that the equitable relief sought here is unavailable because "equity follows the law." Petrs. Br. 47 (quoting *Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting)). The "law" to be enforced in this case is not the statute, but the Constitution itself. See, *e.g.*, *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.); cf. U.S. Br. 10 ("The question in this case ... does not concern the States' substantive [statutory] obligations ... "). Because it is the Constitution that supports a right of action for these claims, the availability of that right does not depend upon whether the underlying statute might also provide one.

Moreover, reaffirming the longstanding rule that preemption claims may be brought directly under the Constitution will not undermine congressional expectations regarding the operation of federal law, as petitioners suggest. Petrs. Br. 27-35. This is for the simple reason that courts uniformly have

recognized the availability of claims under the Supremacy Clause for two centuries. See *supra* notes 4-5. Congress is presumed to legislate against the settled backdrop of this existing law, see, *e.g.*, *Am. Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992), and respondents merely ask this Court to confirm what is already "well-established." *Hart & Wechsler*, *supra*, at 903. In contrast, it is *petitioners* who ask this Court to eliminate an avenue for relief that Congress must have understood was available when it chose not to provide an additional statutory remedy.

For much the same reason, petitioners are unfounded in their concern that courts, by continuing to recognize the preemption right of action, improperly will arrogate to themselves decision-making authority from the expert agencies. Petrs. Br. 27-31. Reaffirming a long-extant right of action works no change on the agencies, which remain free to exercise the discretion delegated to them regardless how the courts interpret ambiguous federal statutes. See *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983-84 (2005); see also *Douglas*, 132 S. Ct. at 1210-11. In all events, justiciability doctrines properly will limit the scope of potential plaintiffs able to bring these challenges.[11]

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[11] For example, political questions will be dismissed as non-justiciable, *e.g.*, *Baker*, 369 U.S. at 217, and plaintiffs suffering no injury-in-fact from the challenged government action will lack standing under Article III, e.g., *Raines* v. *Byrd*, 521 U.S. 811, 821-26 (1997).

II. THE SUPREMACY CLAUSE SUPPORTS PREEMPTION CLAIMS BASED ON FEDERAL STATUTES ENACTED UNDER THE SPENDING CLAUSE.

Petitioners and the United States argue in the alternative that, even if preemption claims generally are available under the Supremacy Clause, they should be precluded when the underlying federal statute was enacted to reimburse States' spending under authority of the Spending Clause. Petrs. Br. 49-54; U.S. Br. 21-23. That rule finds no support in this Court's decisions, and is at odds with the constitutional principle of supremacy.

A. A Preemption Claim Cannot Be Limited Based On The Constitutional Authority Under Which The Federal Statute Was Enacted.

The Supremacy Clause declares simply that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof," shall be "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It does not distinguish between federal statutes based on which constitutional provision authorized Congress to act, and this distinction has never played a role in preemption analysis. See, *e.g.*, *Crosby*, 530 U.S. at 372; see also *PLIVA*, 131 S. Ct. at 2579-80 (Thomas, J.). It thus would do violence to the Constitution's text to import this limitation into the capacious language the Framers adopted. Nor is this distinction relevant to whether a preemption claim is available. Such a claim seeks not to "enforce" the underlying statute, but to vindicate the federal structural interest in supremacy. See *Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting); *Bond*, 131 S. Ct. at 2365. That constitutional interest is enforceable in the federal judiciary regardless of the

particular authority under which Congress acted, or intended to act.

To be sure, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth* v. *Levine*, 555 U.S. 555, 565 (2009). But this inquiry into congressional intent, to determine "the scope of the statute's pre-empti[ve effect]," *Medtronic*, 518 U.S. at 485-86, goes to the merits of the preemption question, not to the antecedent question of whether a cause of action is available to enjoin the operation of preempted state law. See, *e.g.*, *Verizon Md.*, 535 U.S. at 642-43 (addressing merits of preemption claim without expressly resolving validity of the cause of action). This Court never has held that a state law may operate in contravention of a valid federal statute because of the particular power under which Congress proceeded. To the contrary, so long as the federal statute is constitutional and applicable, and is contrary to the state law, the state law is invalid, *Crosby*, 530 U.S. at 372, and a preemption cause of action should be available.

Federal statutes enacted pursuant to Congress's Article I spending power are no exception. It is well-established that Congress "may fix the terms on which it shall disburse federal money to the States," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), and once a State accepts federal money subject to such conditions, a state law contravening those conditions "runs afoul of the Supremacy Clause." *Lawrence Cnty.*, 469 U.S. at 270; see *Bacon*, 457 U.S. at 145-46 ("Because [the state rules] conflict with a valid federal regulation, they are invalid under the Supremacy Clause.").[12] The

[12] *See also Ahlborn*, 547 U.S. at 292; *Bennett* v. *Arkansas*, 485 U.S. 395, 397 (1988) (per curiam); *Townsend* v. *Swank*, 404 U.S. 282, 285 (1971); *King* v. *Smith*, 392 U.S. 309, 333 (1968).

only difference between a federal statute enacted under the Spending Clause and one enacted under another constitutional provision, such as the Necessary and Proper Clause, is that a Spending Clause statute is constitutionally applicable to a State only insofar as the State satisfies the condition precedent of accepting federal funding.

It is therefore unsurprising that, in *PhRMA*, seven Justices agreed that a plaintiff may bring a preemption claim to challenge a state law as invalid under the Medicaid Act. While these Justices differed over whether preemption had been established on the merits, they agreed on the threshold issue that the claim was available. 538 U.S. at 662 (plurality); *id.* at 671 (Breyer, J., concurring); *id.* at 687 (O'Connor, J., dissenting). The United States suggests that *PhRMA* arose in a different context because the plaintiffs there sought to invalidate a regulation affecting their "primary conduct," U.S. Br. 32 n.12. But it is immaterial under the Supremacy Clause whether state legislation regulates "conduct" or limits "benefits." If the challenged legislation contravenes federal law, it is invalid. See, *e.g.*, *Bacon*, 457 U.S. at 145-46 (holding state law excluding individuals from benefits of federal-state program, in violation of program conditions, "invalid under the Supremacy Clause").

Likewise, a rule limiting constitutional preemption claims to only those circumstances in which the plaintiffs assert them as anticipatory defenses to state enforcement actions, U.S. Br. 20, would run counter to many of this Court's decisions. See, *e.g.*, *Osborn*, 22 U.S. at 838 (entering injunction to provide restitution); *Rowe*, 552 U.S. at 371-73 (enjoining enforcement of regulation that directly targeted retailers rather than plaintiff motor carriers); *Engine*

Mfrs. Ass'n v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (enjoining enforcement of regulation that directly targeted car buyers rather than plaintiff manufacturers); *Am. Trucking*, 133 S. Ct. at 2104 (enjoining enforcement of regulation with sanctions enforceable against terminal operators rather than plaintiff trucking companies). Moreover, it would undermine the fundamental purpose of the Supremacy Clause, by enabling States to violate federal law with impunity, so long as they implemented them through artful or self-executing mechanisms.

B. The Structure Of Spending Clause Legislation Does Not Preclude A Preemption Claim.

Nor can statutes enacted pursuant to Spending Clause authority be treated differently merely because they are "conditional," and based on a State's continued participation in the federal program. See Petrs. Br. 49-54; see also U.S. Br. 21-23.

1. Petitioners argue that a State's ability to stop accepting federal money—and thereby escape the reach of conditions imposed by a Spending Clause statute—precludes an action under the Supremacy Clause by parties injured as a result of the State's noncompliance. But, although this Court has analogized federal-state programs such as Medicaid to a "contract" between sovereigns, *Pennhurst*, 451 U.S. at 17, that analogy has not been used to limit the federal statutes' preemptive reach, *e.g.*, *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985). Indeed, this Court has specifically counseled against extending the analogy in that way. *E.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) ("[W]e have been careful not to imply that *all* contract-law rules apply

to Spending Clause legislation."). Petitioners' argument on this score fails for several reasons.

First, this Court has consistently maintained the propriety of injunctions that compel a State's compliance with federal funding conditions, so long as the State remains subject to those conditions. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 (1968); *Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970); cf. *Pennhurst*, 451 U.S. at 30 n.23 (noting that the Court "would have little difficulty" upholding an injunction that forced the State to choose between "rejecting federal funds ... or complying with" the conditions placed upon those funds). A State has no right to accept federal funding while claiming immunity from the federal obligations attached to those funds. *E.g.*, *King*, 392 U.S. at 333. If it finds those conditions unduly burdensome, it may discontinue accepting the funds to which the burden is attached. See *Rosado*, 397 U.S. at 420-21 (explaining that an injunction leaves a State with the "alternative choices of assuming the additional cost of [complying with the federal condition] or not using federal funds").

For this reason, state entities—like petitioners here—have less rather than more reason to complain about a cause of action seeking to hold them to compliance with the federal statute. If the State wishes to avoid the consequences of acting in a fashion inconsistent with federal law, including an action under the Supremacy Clause, it at all times carries an immunity simply by rejecting further funding and thereby avoiding future preemption.

Second, there is no basis for allowing only "intended" "third-party beneficiaries" of the statute to bring a preemption claim when a State violates that statute. U.S. Br. 22-23. Although contract law generally allows a third party to "enforce [a] contract"

only when it was "made for his benefit," 9 John E. Murray, Jr., *Corbin on Contracts* § 44.1, at 45 (rev. ed. 2007), that principle—even if it were properly applied by analogy in this context—would affect only actions brought under the quasi-contractual statute itself. It would not affect preemption actions brought under the Supremacy Clause, seeking not to "enforce" the statute, but to prevent injury caused by operation of a constitutionally invalid state law.[13]

If anything, the analogy to contract law supports the availability of preemption claims based on Spending Clause enactments. Contracting parties operate against a backdrop of default legal rules that govern the interpretation of their agreement. See, *e.g.*, Restatement (Second) of Contracts § 5(2) & cmt. b (1981). When a State accepts federal funding and agrees to be bound by certain conditions, the terms of the relevant "contract" include the constitutional provisions that structure relations between the federal and state governments—including the Supremacy Clause. And, because the Supremacy Clause has for two centuries been treated as providing a cause of action for individuals aggrieved by a preempted state law, *supra* Part I.B, a State that accepts funding under a federal statutory program undeniably does so recognizing that a cause of action under the Supremacy Clause will be available to enjoin state action that violates the federal law.

2. A preemption claim under the Supremacy Clause is no less available when, as here, the State's

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[13] For this reason, the decision in *Astra USA, Inc.* v. *Santa Clara County*, 131 S. Ct. 1342 (2011), is inapposite. There, the plaintiffs sought to enforce the terms of the statute itself, as embodied in a form contract through which the statute was implemented. *Id.* at 1345. Here, the claims at issue arise under the Constitution.

noncompliance with federal law might also trigger a withdrawal of funding by the federal government. Whatever authority Congress might have to displace particular constitutional remedies for certain constitutional violations, this Court never has held that an administrative funding-withdrawal mechanism, without more, is sufficient to demonstrate congressional intent to displace a right of action under the Constitution. To the contrary, this Court repeatedly has held that the possibility of federal funding withdrawal does not preclude judicial relief for parties injured by non-complying States. See, *e.g.*, *Rosado*, 397 U.S. at 420 ("We have considered and rejected the argument that a federal court is without power to ... prohibit the use of federal funds by the States in view of the fact that Congress has [delegated] the power to cut off federal funds for noncompliance with statutory requirements."); see also *Ark. Dep't of Health & Human Servs.* v. *Ahlborn*, 547 U.S. 268, 272 (2006) (state law "contravened federal [Medicaid provision] and was therefore unenforceable").[14]

These cases confirm that the possibility of funding withdrawal does not substitute for, and cannot

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[14] These decisions are consistent with this Court's approach to claims under § 1983, which are not displaced by funding-withdrawal provisions. *See, e.g.*, *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 522 (1990); *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987). Similarly, the possibility of administrative funding withdrawal, without more, is insufficient to override evidence that Congress intended to provide a private right of action under a statute. *See Cannon*, 441 U.S. at 704-06. In this latter category of cases, of course, the relevant inquiry is not whether Congress intended to preclude an action otherwise available, but whether it intended to create a right of action in the first instance. *See, e.g.*, *Sandoval*, 532 U.S. at 286.

displace, a constitutional preemption claim. Whereas a preemption claim seeks to declare a state law void, the withdrawal of funding effectively accomplishes the opposite, eliminating the applicability of federal requirements. See *Rosado*, 397 U.S. at 420. And, although the *threat* of funding withdrawal may be a useful tool in inducing compliance, its actual implementation ultimately harms, rather than helps, those who would bring a preemption cause of action under the Supremacy Clause—the individuals who depend upon or otherwise benefit from federal regulatory programs. Cf. *Cannon*, 441 U.S. at 704-06 (explaining that funding withdrawal is a "severe" tool that "often may not provide an appropriate means" of addressing "isolated violation[s]").

More fundamentally, petitioners' argument that the mere *possibility* of funding withdrawal might displace a preemption claim reflects a critical misunderstanding of the Supremacy Clause. That Clause renders void state law that is inconsistent with any currently applicable federal statute, whether or not that inconsistency might at some later date be resolved. This Court recently recognized precisely this point, refusing to uphold a preempted state law based on "conjectures" regarding "hypothetical federal action[s]" that might later validate that law. *PLIVA*, 131 S. Ct. at 2579 & n.6. Likewise here, although there is always a possibility that a withdrawal of federal funding may render the federal statute inapplicable, that imagined possibility cannot validate state laws that currently conflict with a federal statute. Nor can they preclude a right of action to challenge those laws as void under the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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RICHARD ARMSTRONG, ET AL.,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in constitutional federalism and in preserving the federal powers granted by the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Where, as here, a state law conflicts with federal law, the Supremacy Clause requires federal courts to step in to prevent unlawful state action. Armstrong asks the Court to abandon this clear constitutional command, urging this Court to view the Supremacy Clause as simply a "choice-of-law rule," Pet'rs Br. at 17, that gives no authority to the federal courts to prevent states from enforcing preempted state laws. That argument cannot be squared with the text and history of the Constitution nor with more than two centuries of this Court's precedent recognizing the

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

vital responsibility of the federal judiciary to maintain the federal-state balance.

From the very beginning of our Constitution's history, federal courts were designed to be the frontline against unlawful acts committed by state governments. When the Framers wrote our founding charter more than two centuries ago, they were particularly concerned about unlawful actions by state governments, which had gone unchecked under the dysfunctional government of the Articles of Confederation. They included in the Supremacy Clause a mandate for the judicial branch to void "any Thing" in state law to the "Contrary" of federal law. U.S. Const. art. VI, cl. 2. Judicial review is hard-wired in the text of the Supremacy Clause. As the debates in Philadelphia show, the Framers consciously chose judicial review of state laws as the means for enforcing constitutional limits and ensuring the supremacy of federal law. As James Madison explained, "[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*].

Armstrong's argument that, as a matter of separation of powers and federalism, the courthouse doors must be closed to the plaintiffs in this case, Pet'rs Br. at 14, turns fundamental constitutional principles on their head. It is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and enforce the "great principle" that "the

constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819). In establishing our Constitution, the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring), creating a vibrant federalism that gave broad powers to the states while ensuring that they respected constitutional limits and the supremacy of federal law. Armstrong and his *amici* would improperly deny the courts their historic role in maintaining this constitutional balance of federal-state power.

It makes no difference to this analysis that the state law at issue here is preempted by a federal law enacted pursuant to congressional Spending Clause authority. Ensuring principles of federal supremacy is as fundamentally important when Congress exercises its authority under the Spending Clause as when it exercises other enumerated powers. The Framers recognized that the power to spend for the general welfare was an "indispensable ingredient in every constitution," observing that "[m]oney is considered as the vital principle of the body politic; as that which sustain its life and motion and enables it to perform its most essential functions." The Federalist No. 30, at 156 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the Spending Clause context, as elsewhere, it is imperative that the Supremacy Clause be applied properly. "[T]he whole jurisprudence of preemption" is of vital importance to "maintaining the federal balance." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

For more than 200 years, the judicial branch has permitted suits, including those brought by private parties, to challenge state laws that allegedly violate federal law and requirements. As Chief Justice John Marshall explained, the Framers expected that some state laws would conflict with federal statutes and in "every such case" the law of the state "must yield" to federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Where state action violates federal law, injunctive relief has long been viewed as the appropriate remedy "to arrest the injury" and "prevent the wrong." *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 845 (1824). An unbroken line of cases reflects that "plaintiffs may vindicate pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting). These cases accord preemptive authority to federal laws passed pursuant to the Spending Clause as well as other exercises of Congress's enumerated powers.

Armstrong and his *amici* concede that federal courts may invoke equitable power to vindicate the supremacy of federal law in certain circumstances, but urge this Court to radically revise its precedents here to close the courthouse doors to plaintiffs in this case. These arguments, however, devalue fundamental principles of constitutional supremacy enshrined in the Supremacy Clause, ignore the role of the courts in our constitutional scheme as envisioned by the Framers, and misstate equity's historic role in preventing constitutional wrongs. The court of appeals properly held that plaintiffs could invoke the Supremacy Clause to prevent Idaho from contravening

the Medicaid statute's requirement that reimbursement rates be "consistent with efficiency, economy, and quality of care," 42 U.S.C. 1396a(a)(30)(A), and that judgment should be affirmed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE SUPREMACY CLAUSE GIVE FEDERAL COURTS THE POWER OF JUDICIAL REVIEW TO MAINTAIN THE SUPREMACY OF FEDERAL LAW.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. By including in the Constitution a sweeping declaration of constitutional supremacy and giving to courts the power to declare preempted state law null and void, the Framers provided that "conflicts between state and federal law" would be "resolved by principled adjudication, rather than political will or force." Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1348 (2001).

1. The Supremacy Clause, together with Article III, which provides for an independent federal judiciary with the power to hear all cases arising under "this Constitution, the Law of the United States, and Treaties made under their Authority," U.S. Const. art.

III, § 2, cl. 1, ensures that states respect the supremacy of federal law. As James Madison observed, "the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them." Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 9 *The Writings of James Madison* 137, 142 (Gaillard Hunt ed., 1910); *see also* The Federalist No. 39, *supra*, at 213 (James Madison) (explaining that "in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government").

The "parallel language of the 'Arising Under' and Supremacy Clauses was intentional and structurally crucial," James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 708 (1998), ensuring that private parties who suffered injury at the hands of state authorities could invoke the power of judicial review to challenge state laws that conflicted with federal law. "Otherwise, any one state might repeal the laws of the Union at large." 4 *Elliot's Debates*, *supra*, at 187-88. "To permit the local laws of any state to control the laws of the Union would be to give the general government no powers at all. If the judges are not to be bound by it, the powers of Congress will be nugatory." *Id.* at 181. Without judges enforcing the promise of federal supremacy, our system of government

"would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." The Federalist No. 44, *supra*, at 255 (James Madison); *see Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 355 (1855) ("Without the supreme court . . . neither the constitution nor the laws of congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction that the judges in every State should be bound thereby would be useless . .").

2. The Framers crafted the Supremacy Clause against the backdrop of numerous abuses of state authority under the Articles of Confederation, which established a single branch of the federal government, but contained no mechanism for ensuring federal supremacy. Under the dysfunctional government of the Articles, the federal government could not enforce its laws, prompting Alexander Hamilton to observe that a "most palpable defect of the existing Confederation is the total want of a SANCTION to its laws." The Federalist No. 21, *supra*, at 106 (Alexander Hamilton); *see id.* No. 22, at 118 (Alexander Hamilton) (explaining that "[l]aws are a dead letter without courts to expound and define their true meaning and operation"). The result, Madison lamented, is that "acts of Congs. depend[] for their execution on the will of the state legislatures," making federal laws "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975).

The Framers gathered together in Philadelphia in 1787 to correct these "vices" resulting from the lack of "effectual control in the whole over its parts." 1 *The Records of the Federal Convention of 1787*, at 167 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*]. At the Convention, they extensively debated different possible means to ensure the supremacy of federal law, including use of force by the executive, a congressional veto on state laws, as well as judicial review.

Early in the Convention, Governor Edmund Randolph of Virginia proposed an initial mechanism to ensure the supremacy of federal law, recommending that the "National Legislature" be given the power "to negative all laws passed by the several States," as well as the power "to call forth the force of the Union" against a state "failing to fulfill its duty." 1 *Farrand's Records*, *supra*, at 21. While James Madison supported the legislative "negative," he strongly disagreed with reliance upon military force to resolve conflicts between federal and state law. "The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." *Id.* at 54. Randolph was persuaded to change his position, agreeing that the use of force would be "impracticable, expensive, [and] cruel to individuals." *Id.* at 256 (emphasis omitted). The Framers overwhelmingly preferred a "coer[c]ion of laws" to a "coer[c]ion of arms." *Id.* at 284 (Alexander Hamilton); *see* 3 *Elliot's Debates*, *supra*, at 554 (John Marshall) ("What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly

manner, without shedding blood, or creating a contest, or availing yourselves of force?").

While Madison convinced his colleagues to relinquish the military option, he could not persuade them to embrace the use of congressional power to invalidate state laws. His reasoning in support of the congressional negation of state law met with fierce resistance, precisely because a majority of delegates preferred to rely on judicial review for this important task. As Governor Morris argued, "[a] law that ought to be negatived will be set aside in the Judiciary department. and if that security should fail; may be repealed by a Nationl. law." 2 *Farrand's Records*, *supra*, at 28. The proposal for Congress to nullify state laws was defeated by a vote of three states in favor to seven states against. *Id.* In rejecting the congressional negative, "the Framers substituted judicial review of state laws for congressional control of state legislatures." *FERC v. Mississippi*, 456 U.S. 742, 795 (1982) (O'Connor, J., concurring in part and dissenting in part).

Immediately after the defeat of the negative, Luther Martin of Maryland proposed an initial version of the Supremacy Clause, which provided that "the Legislative acts of the [United States] shall be the supreme law of the respective States [and] that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding." 2 *Farrand's Records*, *supra*, at 28-29. The Convention unanimously adopted this supremacy provision.

The Framers' decision to vest the federal courts with the responsibility to ensure the supremacy of federal law through the exercise of judicial review in law suits brought by injured private parties reflected the Framers' belief that the judiciary was the "quarter [to] look for protection from an infringement on the Constitution," 3 *Elliot's Debates*, *supra*, at 554 (John Marshall), and that review by an independent judge was the only "natural and effectual method of enforcing laws." 4 *Elliot's Debates*, *supra*, at 140 (James Iredell); *see also id.* at 158 (William Davie) ("[T]he judicial power ought to be coëxtensive with the legislative. The federal government ought to possess the means of carrying the laws into execution . . . If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?"). Access to the courts was essential to protect individual liberty, prevent government abuse, and ensure the supremacy of federal law.

Over the course of the rest of the Convention, the Framers strengthened the requirement of federal supremacy. First, the Committee on Detail subjected state constitutions as well as state laws to the requirement of federal supremacy and changed the phrase "the Judiciaries of the several States" to "the judges in the several States," imposing a personal mandate on judges to uphold federal law. 2 *Farrand's Records*, *supra*, at 183. Second, the Convention unanimously agreed to add that the United States Constitution is supreme to state laws. *Id.* at 389.

Third, the Convention broadened the language of Article III's "Arising Under" Clause to conform with the now-expanded Supremacy Clause, *id.* at 431,

"self-consciously and irrevocably forg[ing] the constitutional structural link between the front-line decisionmaking of 'the Judges in every State' under the Supremacy Clause and the supervisory decisionmaking of the federal judiciary when called upon to exercise the 'arising under' jurisdiction permitted by the judiciary article." Liebman & Ryan, *supra*, at 747. This ensured that federal as well as state courts would have the authority to vindicate the supremacy of federal law in cases brought by aggrieved individuals.

Fourth, and finally, the Committee on Style Revision replaced the words "the supreme law of the states" with the phrase "the supreme law of the land." 2 *Farrand's Records*, *supra*, at 603. As Professor Amar explains, "the implication was continental: one Constitution, one land, one People." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1458 (1987). This change in wording left no doubt "[t]he people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme." *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868). The Founding generation believed that federal laws "would embody the judgment of America as a whole, as distinct from the more parochial view of any particular local part," and therefore federal statutes have "priority over any inconsistent state-law norm." Akhil Reed Amar, *America's Constitution: A Biography* 300 (2005). The Supremacy Clause establishes federal law as embodying the will of the nation's people, who are empowered to turn to the judiciary for enforcement.

In sum, the Constitution's text and history establish that providing for judicial review in cases of conflict between federal and state law was at the core of the Supremacy Clause. Armstrong and his *amici* are simply incorrect when they state that the Supremacy Clause is a "choice-of-law" or "rule of decision" provision, Pet'rs Br. at 15, 17; Texas et al. Br. at 6-7, that has nothing to do with judicial review. On the contrary, "the Convention resolved the debate over how to enforce the supremacy of federal law by reliance on the judicial duty to apply federal law in cases of conflict." *See* NGA et al. Br. at 19.[2]

3. Consistent with this text and history, Supreme Court precedent dating back to the Marshall Court establishes that courts have a constitutional obligation to maintain the federal-state balance by declaring null and void state laws that conflict with federal law.

As Chief Justice Marshall explained in *Gibbons v. Ogden*, the Constitution specifically "declar[es] the supremacy not only of itself, but of the laws made in

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[2] *Amici* NGA and Council of State Governments suggest that "authorizing private lawsuits in *all* cases of arguable federal pre-emption would replicate much of the intrusion the opponents of the negative found troubling," NGA et al. Br. at 24. That argument ignores the fundamental difference between the congressional negative the Framers rejected, which would have given Congress an unfettered power to void state laws, and the system of judicial review they wrote into the Constitution, which gave the courts the power to strike down state laws that transgressed the Constitution, duly-enacted federal laws, and treaties in cases brought by aggrieved persons. As the Constitution's text and history discussed above show, the Framers gave courts the duty to police the federal-state balance and invalidate state laws in conflict with federal law.

pursuance of it." *Gibbons*, 22 U.S. at 210. Thus, "[i]n every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 211. Accordingly, "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002). Even absent a private cause of action under a federal statute or 42 U.S.C. 1983, plaintiffs may bring "pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Golden Transit Corp.*, 493 U.S. at 119 (Kennedy, J., dissenting). An aggrieved individual need not rely on those other sources of law "to vest in him a right to assert that an attempted exercise of jurisdiction or control violates the proper distribution of powers within the federal system." *Id.* at 114 (Kennedy, J., dissenting).

II. THE TEXT AND HISTORY OF THE CONSTITUTION SUPPORT THE AVAILABILITY OF EQUITABLE RELIEF TO PROHIBIT UNCONSTITUTIONAL STATE ACTION EVEN IN THE ABSENCE OF A STATUTORY CAUSE OF ACTION.

Equitable relief "'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Free Enter. Fund v. Public Co. Ac-*

counting Oversight Bd., 561 U.S. 477, 491 n.2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). The power of Article III courts to issue such relief is anchored directly in the text of the Constitution and flows from equity's historic mission of preventing illegal action for which there is no adequate remedy at law. When the Framers designed our system of government, they made sure to give the federal courts the "judicial power" to enforce the Constitution and maintain the supremacy of federal law in "all Cases, in Law and Equity, arising under this Constitution[and] the Laws of the United States." U.S. Const. art. III, § 2, cl. 1. By granting courts the power to award equitable as well as legal remedies, the Framers ensured that courts would possess the "effectual power" to "restrain or correct the infractions" of the Constitution by the states. The Federalist No. 80, *supra*, at 444 (Alexander Hamilton); *see also* James E. Pfander, *Rethinking The Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Calif. L. Rev. 555, 601 (1994) ("[F]ederal courts, by virtue of their authority to hear 'cases' in law and equity, would enjoy the power to 'restrain' or enjoin state infractions of the Constitution .").

By extending the "judicial Power" to "all Cases, in Law and Equity," the Framers incorporated a well-established understanding about the scope of judicial authority and the types of relief the courts could provide. Pursuant to that understanding, "[c]ourts of equity had the authority to, and did in fact, create causes of action in cases where courts of law would not issue damages." John F. Preis, *In Defense of Implied Injunction Relief in Constitutional Cases*, 22 Wm. & Mary Bill Rts. J. 1, 7 (2013). Thus, regardless whether individuals may seek *damages* for injuries

caused by constitutional violations in the absence of a statute creating a specific "cause of action," they can surely seek the sort of *equitable relief* to prevent implementation of unconstitutional state laws that Respondents seek here.

1. Dating back to the fourteenth century, England recognized two distinct types of courts: common-law courts that issued a "variety of standardized writs," each of which specified a "'complete set of substantive, procedural, and evidentiary law" that applied to the case, and equitable courts that both "enforc[ed] . claims created anew by equity" and provided "new and distinct remedies for the violation of preexisting legal rights." Preis, *supra*, at 11-12 (quoting H. Brent McKnight, *How then Shall We Reason, The Historical Setting of Equity*, 45 Mercer L. Rev. 919, 929 (1994)). By the time of the Framing, these two distinct courts were well-established on both sides of the Atlantic. *Cf.* Solon Dyke Wilson, *Courts of Chancery in the American Colonies, in* 2 *Select Essays in Anglo-American Legal History* 779, 779 (1907) ("Prior to the Revolution, courts of chancery had existed in some shape or other in every one of the thirteen colonies.").

Although common law courts would only hear cases where there was a recognized form of action, F. W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* 296-300 (A. H. Chaytor & W. J. Whitaker eds., 1920), equity courts did not require that the cases they heard adhere to the set forms that were cognizable at common law, John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* 7-9 (2d ed. 1787). As Joseph Story explained, equity jurisdiction existed where "a wrong [wa]s done, for which there [wa]s no plain, ad-

equate, and complete remedy in the Courts of Common Law." 1 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 49 (14th ed. 1918).

Because equity courts were concerned principally with whether a wrong had been committed, a plaintiff bringing a claim in equity did not have to show that he would be able to bring a claim at common law, or that a statute provided a "right" that would be recognized by common law courts. Rather, all a plaintiff had to show was "that the subject of the suit is such upon which a court of equity will assume jurisdiction." Mitford, *supra*, at 120-21. As Story and others explained, equity jurisdiction was quite broad, extending to cases where "the principles of law by which the ordinary courts are guided *give no right*," *id.* at 103-04 (emphasis added); *see* Story, *supra*, at § 29; 1 John Norton Pomeroy, *A Treatise of Equity Jurisprudence as Administered in the United States of America* § 424 (1881). Thus, for example, in 1491, the Archbishop of Canterbury readily disposed of an argument that he was without jurisdiction to consider a case because there would have been no right violated at common law. As he explained, "It is so in all cases where there is no remedy at the common law and no right, and yet a good remedy in equity." *Id.* at § 50 n.1 (quoting Year Book of Henry VII, folio 12); *see id.* at § 423.

In short, "[a]t the time of the American Founding, it was not uncommon for Chancery to enforce the common law through equitable remedies even where the common law might not itself make damages available." Preis, *supra*, at 15; *cf.* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*,

1988 Duke L.J. 879, 880 (1988) ("Equity granted relief—and common law courts did not—in numerous situations involving one person's abuse of confidence reposed in him by another.").

2. When the Framers defined the "judicial Power" to include "all Cases, in Law and Equity," U.S. Const. art. III, § 2, cl. 1, they were incorporating into the Constitution this well-established understanding about the power of equitable courts to provide remedies in the absence of a common law right. Indeed, although there was little discussion about the precise meaning of those terms at the Convention, during the debates about whether to ratify the Constitution, some anti-Federalists expressed concern about giving federal judges equitable powers because of the significant power that would afford them. Letters from the Federal Farmer to the Republican III (Oct. 10, 1787), http://www.constitution.org/afp/fedfar03.htm.

The first Congress subsequently identified the initial set of cases in which the courts could exercise this power by giving the courts diversity jurisdiction over suits "in equity" in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. Ever since this initial grant of power, federal courts exercising their equitable powers have applied the same principles and provided the same remedies available in the High Court of Chancery in England. As this Court has explained it, "since the organization of the government," "[t]he usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings" in equity cases, and other than where statutes defining federal jurisdiction generally impose limits, "there is no other limitation to the exercise of a chancery jurisdiction by these courts." *Penn-*

sylvania v. Wheeling & Belmont-Bridge Co., 54 U.S. (13 How.) 518, 563 (1851); *see Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("[E]quity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution "); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832); *see also* Story, *supra*, at § 57.

Consistent with these basic equity principles, more than 150 years ago, this Court specifically recognized the power of federal courts to fashion equitable remedies to ensure the supremacy of federal law, including in cases where Congress had not provided any statutory right of action. *See Wheeling & Belmont-Bridge Co.*, 54 U.S. at 566 ("This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction."). As *Wheeling Bridge* reflects, so long as a federal court had a basis for subject matter jurisdiction, it could issue equitable remedies to maintain the supremacy of federal law in cases in which there was no adequate remedy at law. It did not matter whether Congress had provided a private right of action.

3. The relief Respondents seek here—an injunction prohibiting State officials from implementing state law that conflicts with the federal Medicaid statute—is precisely the type of relief that would have been available in equity courts at the Framing.

When equity courts had jurisdiction over a case, the question they addressed was whether the plaintiff suffered an "injury" as a result of the defendant's unlawful acts. Mitford, *supra*, at 32-33. If he did, the court could issue an injunction "to restrain the defendant from . doing any injurious act." *Id.* at 46. Applying this basic principle, courts of equity regularly issued relief to prevent injury caused by public officials engaging in *ultra vires* action, *see, e.g.*, *Hughes v. Trs. of Morden College*, 1 Vesey 188 (Ch. 1748), and courts in the early nineteenth century concluded that "relief may be given in a court of equity to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845); *see, e.g.*, *Belknap v. Belknap*, 2 Johns. Ch. 463, 473 (N.Y. Ch. 1817) (based on "well settled" "jurisdiction of chancery," "chancery would restrain [commissioners] by injunction" if they "exceeded their powers"); *Baring v. Erdman*, 2 F. Cas. 784, 786 (C.C.E.D. Pa. 1834) (No. 981) (where acts of public officials "transcend the authority conferred on them by law," they are subject to control by injunction to prevent "irreparable injury"); *Frewin v. Lewis*, 4 Mylne & Craig 249, 254-55 (Ch. 1838) (equity court will prevent injury by enjoining public officials from acting "beyond the line of their authority").

Ever since this Court's decision in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), it has been well settled that federal courts have the authority to maintain the federal-state balance and issue injunctive relief in cases in which a state law is "repugnant to the constitution, or to a law of the United States made in pursuance thereof." *Osborn*, 22 U.S. at 859. As Chief Justice Marshall explained,

"it is the province of a Court of equity to arrest the injury, and prevent the wrong." *Id.* at 845. The exercise of that remedy "is to vindicate the supremacy of the constitution, and to maintain the integrity of the powers and rights which it confers." *Allen v. Baltimore & O. R. Co.*, 114 U.S. 311, 316 (1885).

Osborn's holding that "circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state has never been departed from," *Pennoyer v. McConnaughey*, 140 U.S. 1, 12 (1891) and, together with *Ex Parte Young*, 209 U.S. 123 (1908), reflects that "certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land." *Alden v. Maine*, 527 U.S. 706, 747 (1999). As the Court has long recognized, "the availability of prospective relief gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

Armstrong and his *amici* concede, as they must, that there is a long history of federal courts granting equitable relief in preemption cases to vindicate the guarantee of the Supremacy Clause that federal law is superior in force to state law, *see* Pet'rs Br. at 40-41, 43-44; U.S. Br. at 20 (recognizing that "the ability of private parties to obtain protection in the face of state compulsion that violates federal law has considerable historical grounding"), but they argue that private parties should not be able to obtain this type of protection in this case. According to Armstrong and the Solicitor General, the federal courts' equita-

ble powers should be viewed as limited to suits brought as "an anticipatory defense to state enforcement proceedings," Pet'rs Br. at 40; U.S. Br. at 20. But neither Armstrong nor the Solicitor General offers either Framing-era evidence or court precedents to support the suggestion that the historical power of equitable courts was so limited and, as discussed above, it was not.[3] Armstrong's arguments would leave courts powerless to enforce the supremacy of federal law in this and other cases, effectively making state law supreme over federal. That cannot be what the Supremacy Clause means.

The Supremacy Clause makes *all* federal laws enacted pursuant to Congress's enumerated powers the supreme law of the land, not simply a fraction of them. There is no basis in constitutional text and history, this Court's precedent from *Osborn* on, or equity's historic mission of "[p]revention of impending injury by unlawful action," *Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 536 (1925), for carving out an exception to the courts' constitutional responsibility to enforce the Supremacy Clause and maintain the federal-state balance. Plaintiffs, no less than others challenging state action

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[3] *Amici* NGA and Council of State Governments also concede that equity can provide private parties a right to seek redress for unconstitutional action, *see* NGA et al. Br. at 26, but argues that "under equity, only negative injunctive relief was permitted," *id.* at 29. This argument either misunderstands the nature of "negative injunctive relief" or the relief Respondents seek here. All Respondents seek is an injunction *prohibiting* the State from violating the Medicaid statute. Such equitable relief is clearly of the type that would have been available at the Framing. *See supra* at 18-19.

as contrary to federal law, are entitled to their day in court to present their claims.

III. SPENDING CLAUSE LEGISLATION IS ENTITLED TO THE SAME PREEMPTIVE FORCE AS OTHER EXERCISES OF CONGRESS' ENUMERATED POWERS.

Fundamental constitutional principles of federal supremacy apply with full force to legislation, such as the Medicaid Act involved in this case, enacted pursuant to Congress's powers under the Spending Clause. Spending Clause enactments, like statutes passed to effectuate other enumerated powers, are the supreme law of the land.

1. Providing Congress the power to tax and spend was of central importance to the drafters of our Constitution: they had witnessed the disastrous consequences of the Articles of Confederation's failure to provide for such a power. Under the Articles of Confederation, Congress could raise money only by making requests to the States, but "State governments had often failed to provide the funds that the Confederation demanded of them. Without a strong revenue stream, vital federal functions were withering." Amar, *America's Constitution*, *supra*, at 106. Indeed, this created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War, and he lamented the dire situation in which the soldiers had been placed as a result of Congress's inability to levy taxes to support the Army. *See* Letter from George Washington to Joseph Jones (May 31, 1780), *in* 18 *The Writings of George Washington* 452, 453 (John C. Fitzpatrick ed., 1937); *see also* Circular to State Gov-

ernments (Oct. 18, 1780), *in Washington: Writings* 393, 393 (John Rhodehamel ed., 1997); Letter from George Washington to Lund Washington (March 19, 1783), *in Washington: Writings* 502, 502-03 (John Rhodehamel ed., 1997).

This historical foundation explains why the Spending Clause is the first and one of the most sweeping powers the Constitution confers upon Congress, providing the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. The power to tax and spend for the common defense and general welfare is "an indispensible ingredient in every constitution," The Federalist No. 30, *supra*, at 156 (Alexander Hamilton), and it was essential for the Constitution to "embrace a provision for the support of the national civic list; for the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury." *Id.*

The Framers recognized that "government should be able to command all the resources of the country; because no man can tell what our exigencies may be. Government must therefore be able to command the whole power of the purse " 2 *Elliot's Debates*, *supra*, at 191. Recognizing that "money is the nerve – the life and soul of a government," 3 *Elliot's Debates*, *supra*, at 115, and that which "enables it to perform its most essential functions," The Federalist 30, *supra*, at 156 (Alexander Hamilton), the Convention wrote the Spending Clause in the broadest terms possible, empowering the government to spend money to provide for the general welfare of the

United States. As Alexander Hamilton observed, "The phrase is as comprehensive as any that could have been used [T]his necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition." Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), *in* 10 *The Papers of Alexander Hamilton* 252, 252-56 (Harold C. Syrett & Jacob E. Cooke eds., 1966).

2. Consistent with this text and history, this Court has held that Congress may use its Spending Clause authority "to grant federal funds to the States" and may impose legally enforceable conditions on the States to "ensure that the funds are used by the States to 'provide for the general Welfare' in the manner Congress intended." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601, 2602 (2012). In a long line of cases, this Court has repeatedly applied the Supremacy Clause to give preemptive force to congressional legislation under the Spending Clause imposing conditions on states' receipt of federal funding, ensuring that states do not act in conflict with federal law. *See, e.g.*, *Wos v. E.M.A.*, 133 S. Ct. 1391, 1398-99 (2013); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476-77 (1996); *Bennett v. Arkansas*, 485 U.S. 395, 397-98 (1988); *Rosado v. Wyman*, 397 U.S. 397, 420-23 (1970); *King v. Smith*, 392 U.S. 309, 333 n.34 (1968). As this string of rulings reflects, "[c]onditional spending statutes are no less 'law' than any other kind of federal legislation," Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 Duke L.J. 345, 391 (2008). There is no "Spending Clause" exception to the Supremacy Clause.

Thus, while Spending Clause legislation is "'much in the nature of a contract,'" *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (emphasis omitted)), this Court fulfills its obligation to maintain the federal-state balance by holding states to their bargain. Here, Idaho agreed to abide by the federal requirement to ensure that Medicaid "payments are consistent with efficiency, economy, and quality of care," 42 U.S.C. 1396a(a)(30)(A), but chose to set artificially low reimbursement rates for purely budgetary reasons. Indeed, despite cost studies establishing that rates were too low, the Idaho legislature refused to increase rates to bring them into compliance with federal law. In these circumstances, the court of appeals properly exercised its historic role in maintaining the federal-state balance by holding the state's action contrary to the supremacy of federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RICHARD ARMSTRONG, ET AL.,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC. ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR FORMER HHS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae listed in the Appendix are former senior officials of the Department of Health and Human Services ("HHS") or its predecessor, the Department of Health, Education, and Welfare ("HEW").[1] Each of the *amici* exercised direct control over the administration of Medicaid, provided legal counsel about Medicaid's implementation, or advised the Secretary of HHS or HEW on Medicaid policy.[2] *Amici* hold different views about various aspects of the Medicaid Act and its enforcement,[3] but we come together in this case to respond to the brief filed by the United States as *amicus curiae* in support of petitioners (hereinafter "Gov't Br."). As the Government acknowledges, this Court has entertained nonstatutory injunctive claims based on preemption in certain circumstances, whether grounded in the Supremacy

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[1] The parties' blanket consents to the filing of *amici curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

[2] HEW was bifurcated into the Department of Education and the Department of Health and Human Services in 1979. The Centers for Medicare and Medicaid Services ("CMS")—the HHS agency that administers Medicaid—was known as the Health Care Financing Administration ("HCFA") from its inception in 1977 until 2001. References to these agencies in this brief reflect their name at the relevant time.

[3] Although there is no single "Medicaid Act," this Court has often used that term to refer collectively to the Medicaid program's statutory provisions. See, *e.g.*, *Wos* v. *E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1399 (2013). For ease of reference, *amici* will follow that practice here.

Clause, general equitable jurisprudence, or other legal principles. Gov't Br. 16–21. The Government assumes that such causes of action are properly available in a variety of circumstances "to vindicate the supremacy of federal law," *id.* at 21, but argues that no such cause of action should be recognized to permit Medicaid providers to enforce the "equal access" provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A) (hereinafter "Section 30(A)"). In the collective experience of *amici*, the arguments advanced by the Government in this case are at odds with HHS's longstanding administrative practice and understanding of the Medicaid Act. Furthermore, if the Court were to adopt the Government's cramped view, it would seriously undermine enforcement of one of Medicaid's most fundamental provisions. *Amici* therefore urge the Court to affirm the judgment below.

STATEMENT

A. Medicaid's Statutory Framework

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). As part of this arrangement, a participating state submits to HHS a detailed "plan for medical assistance," which describes the intricacies of how a Medicaid program is to be administered in that state and how the proposed program will comply with the terms of the Act. *Ibid.*; see also 42 U.S.C. § 1396a(a); 42 C.F.R. § 430.10. In exchange, that state receives reimbursement from the federal government for a substantial

portion of the costs of administering the plan. See 42 U.S.C. § 1396d(b); 42 C.F.R. § 433.10(b).

The Medicaid Act requires a state plan to comply with numerous substantive requirements. The Secretary of HHS and her designees determine compliance in the first instance by deciding whether to approve the plan (or any amendments thereto).[4] Once the plan has been approved, however, the Secretary's options for ensuring continued compliance are limited. The Secretary can initiate a compliance proceeding and withhold funding.[5] But that creates a risk that individuals who depend upon Medicaid will be denied service. Thus, compliance proceedings are a drastic remedy that the agency rarely pursues. Instead, as discussed below, HHS has historically relied on private enforcement as a central means of ensuring compliance with various Medicaid provisions.

B. The Equal Access Mandate

One of Medicaid's most important requirements is the "equal access" mandate, which requires state plans to be designed—and payment levels set—to ensure that Medicaid beneficiaries have access to the same type of care and quality enjoyed by the general population. This mandate is currently codified as Section 30(A), which provides that a state Medicaid plan must:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as may be

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[4] 42 U.S.C. §§ 1316(a)-(b); 42 U.S.C. § 1396a(b); 42 C.F.R. § 430.10.

[5] 42 U.S.C. § 1396c; 42 C.F.R. § 430.35.

> necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

Although Section 30(A) was not enacted in this form until 1989, the basic principle of equal access has been implicit in the statutory scheme since Medicaid's inception and was recognized by HEW in the early days of the program. As originally enacted in 1965, the Medicaid Act provided that medical assistance provided under a state plan "shall not be less in amount, duration, or scope than the medical or remedial care and services made available to individuals not receiving aid or assistance under any such plan." Social Security Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 345. That principle began taking a more tangible form in 1966, when HEW included the prototype for what became Section 30(A) in its Public Assistance Administration Handbook.[6] In 1971, HEW issued a regulation requiring state plans to "[p]rovide that fee structures will be established which are designed to enlist participation of a sufficient number of providers of services in the program so that eligible persons can receive the medical care and services included in the plan at least to the extent that these are available to the general population." 45 C.F.R. § 250.30(a)(5)

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[6] See *DeGregorio* v. *O'Bannon*, 500 F. Supp. 541, 549 n.13 (E.D. Pa. 1980).

(1972). And in 1978, HEW reinforced the equal access regulation by issuing a self-governing rule requiring adequate reimbursement for providers. See 43 Fed. Reg. 45,176, 45,258 (Sept. 29, 1978).[7]

Congress ultimately codified the equal access provision in 1989. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260. It did so in light of the fear that physicians would not participate as Medicaid providers unless reimbursement rates were at least somewhat on par with the rates charged by non-Medicaid providers in a geographic area. See H.R. Rep. No. 101-247, 101st Cong., 1st Sess. 390 (1989).[8] Though the wording of the provision differed slightly from its regulatory predecessors, the promise remained the same: Medicaid beneficiaries would have a statutory right to the same type of care and quality enjoyed by the general population—a right that would be vindicated by requiring adequate reimbursement levels for providers.

SUMMARY OF ARGUMENT

Since the early days of the Medicaid program, federal courts have recognized that providers may sue to ensure that state Medicaid plans conform to the requirements of federal law. Congress intended for such enforcement, and HHS has understood—and come to rely upon—its existence.

In *Wilder* v. *Virginia Hospital Ass'n*, 496 U.S. 498 (1990), the Court relied on this past practice and understanding in holding that a former provision of the

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[7] This rule is still in force. See 42 C.F.R. § 447.204.

[8] See also Abigail R. Moncrieff, Comment, *Payments to Medicaid Doctors: Interpreting the "Equal Access" Provision*, 73 U. Chi. L. Rev. 673, 686 (2006).

Medicaid Act similar in structure to Section 30(A) could be enforced under 42 U.S.C. § 1983. Although the issue here is whether a nonstatutory right of action under the Supremacy Cause should be recognized to enforce Section 30(A) (as opposed to a § 1983 action), the reasoning of *Wilder* is still instructive. Applying *Wilder*'s reasoning to the equal access provision reveals Section 30(A) imposes a mandate on states that, if violated in a manner that causes injury to providers and beneficiaries, can be enforced through the Supremacy Clause.

Not only has HHS historically understood and accepted that the Medicaid Act is privately enforceable, it has come to rely on that fact. Every aspect of the Department's administration of the Medicaid program—from its regulations to its annual budget—is premised on the understanding that private parties will shoulder much of the enforcement burden. CMS lacks the logistical and financial resources necessary to be the exclusive enforcer of the equal access mandate, and it is highly unlikely to receive the necessary resources in the future. Moreover, exclusive enforcement conflicts with the agency's regulatory priorities. Given that the Department's focus has always been to promote cost-savings and efficiency, charging HHS with the sole responsibility of ensuring the quality of care and availability of access—factors that *increase* the program's costs—makes little sense as a matter of practice or policy.

The Government also suggests Section 30(A) cannot be judicially administered because its standards are too vague and ambiguous. That argument is belied by the body of Section 30(A) caselaw. Judges have competently interpreted the provision for decades and will continue to do so, particularly if a state

challenges the Secretary's decision to reject a plan for violating Section 30(A)—the very approach the Government argues for in lieu of private enforcement. Nor does private enforcement endanger HHS's expert role in administering Medicaid; should a court's interpretation of an ambiguous term in Section 30(A) conflict with the agency's, HHS will always prevail.

Finally, there is little merit to the Government's suggestion that the Medicaid Act's status as a Spending Clause statute militates against provider enforcement. Although Spending Clause laws are somewhat analogous to contracts, that does not mean only contractual principles are to be applied in interpreting such laws. And even under traditional principles of contract law, beneficiaries and providers can hardly be called "incidental" beneficiaries of the Medicaid Act.

ARGUMENT

I. Congressional Intent, This Court's Caselaw, and Historical Practice Support the Conclusion That Section 30(A) Is Privately Enforceable

The Government argues that this Court has never squarely decided if a nonstatutory cause of action for equitable relief based on preemption should be available, yet acknowledges that the Court has entertained such claims in a variety of contexts. Gov't Br. 15–21. It then proceeds on the assumption that "a nonstatutory cause of action is properly available to vindicate the supremacy of federal law in certain circumstances." *Id.* at 21. The Government therefore implicitly concedes that there are cases in which private parties may seek equitable relief on preemption grounds despite the absence of a specific statutory

cause of action (such as enforcement under 42 U.S.C. § 1983). It simply contends there is no cognizable private right of action to enforce Section 30(A).

Amici agree that a nonstatutory equitable cause of action to enforce the primacy of federal law—whether "rooted in general equitable jurisprudence, the Supremacy Clause, or otherwise"—should be available in some circumstances.[9] Gov't Br. 21. Private enforcement of key provisions of the Medicaid Act is—and has long been understood to be—one of those circumstances.

Indeed, there is a long history of providers suing in federal court to ensure that state plans conform to the Medicaid Act's requirements. This Court recognized that history in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), holding that "it is clear Congress intended that health care providers be able to sue in federal court for injunctive relief" to enforce provisions of the Medicaid Act that affect provider reimbursement. *Id.* at 516. As the Court observed, citing numerous examples, provider suits were legion in the 1970s. *Id.* at 516 & n.14.

The provider actions cited in *Wilder* were brought prior to *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), which held that § 1983 could be used to remedy violations of federal statutory rights (as well as constitutional rights). See *id.* at 5–6. As a result, these early provider suits were not brought under § 1983, but relied

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[9] *Amici* agree that the Medicaid Act does not provide an express cause of action nor one that can be implied in accordance with *Cort* v. *Ash*, 422 U.S. 66 (1975). As discussed below, however, the Act confers clearly discernible *rights* that may be vindicated through various causes of action, such as § 1983, the Supremacy Clause, or other nonstatutory equitable vehicles.

on a variety of other theories. See *St. Mary's Hosp. of E. St. Louis, Inc.* v. *Ogilvie*, 496 F.2d 1324, 1325 (7th Cir. 1974) (noting the suit was filed "under Title XIX of the Social Security Act"); *Catholic Med. Ctr. of Brooklyn & Queens, Inc.* v. *Rockefeller*, 430 F.2d 1297, 1298 (2d Cir. 1970) (assuming, without deciding, that the Supremacy Clause is the proper vehicle for a provider challenge).

The legislative history of various amendments to the Medicaid Act over the years shows that Congress understood and expected that providers would be able to compel state compliance by enforcing federal law. One example comes from the history of a 1975 statute abrogating Eleventh Amendment immunity for states implementing Medicaid. See H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. 3 (1976). Prior to the abrogation provision's enactment, states would unilaterally delay payments to providers and freeze rates without HEW approval. *Id.* at 4. HEW was slow to react. *Ibid.* Congress recognized that, in these circumstances, "providers could sue the State to enjoin action" but had no recourse for obtaining retrospective damages. *Ibid.* It therefore passed a provision "requiring States to consent to be sued in the Federal courts on issues relating to the payment of reasonable cost." *Ibid.* These money-damages suits, however, became cumbersome and hindered the efficiency of state programs. *Ibid.* So Congress repealed the abrogation in 1976, disallowing further claims for monetary relief. But it deliberately kept intact provider suits for injunctive relief. *Id.* at 7 (statement of Marjorie Lynch, Undersecretary of HEW) ("[P]roviders can continue, of course, to institute suit for injunctive relief in State or Federal courts, as necessary.").

Four years after the abrogation provision's repeal, Congress enacted the Boren Amendment, which required state plans to provide for rates that the states found to be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *Wilder*, 496 U.S. at 501–502 (citation and internal quotation marks omitted). In doing so, Congress expressed its intent for judicial review to continue to serve as a backstop for Medicaid enforcement, despite the Secretary's own authority. See H.R. Rep. No. 97-158, 97th Cong., 1st Sess. 301 (1981) ("Of course, in instances where the States or the Secretary fail to observe these statutory requirements, the courts would be expected to take appropriate remedial action.").[10] Congress repealed the Amendment in 1997. But the legislative history of the repeal reflected an understanding that this action would not affect private enforcement of other Medicaid provisions such as Section 30(A). See *Welfare and Medicaid Reform: Hearings Before the S. Comm. on Fin.*, 104th Cong., 2d Sess. 131 (1996) (statement of the Honorable Donna Shalala, Secretary of HHS) (noting the repeal of the Boren Amendment "does not undermine beneficiaries' ability to enforce their Federal guarantee to coverage and benefits").

In 1994, the Court amended the Social Security Act ("SSA")—of which the Medicaid Act is a part—in response to this Court's decision in *Suter* v. *Artist M.*,

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[10] *See also* Edward Alan Miller, *Federal Administrative and Judicial Oversight of Medicaid: Policy Legacies and Tandem Institutions Under the Boren Amendment*, 38 Publius 315, 321–326 (2008) (summarizing widespread judicial enforcement of the Boren Amendment).

503 U.S. 347 (1992). *Suter* held that the "reasonable efforts" requirement imposed on state adoption plans by the Child Welfare Act of 1980 did not confer rights that could be enforced through § 1983. *Id.* at 364. Congress responded by enacting 42 U.S.C. § 1320a-2, which provides that, "[i]n an action brought to enforce a provision of the [SSA], such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan." The statute further specified that it was "not intended to limit or expand the grounds *for determining the availability of private actions to enforce State plan requirements* other than by overturning any such grounds applied in *Suter* but not applied in prior Supreme Court decisions respecting such enforceability." *Ibid.* (emphasis added). Contrary to the Government's argument, Gov't Br. 29–30, this language makes clear that Congress did not intend to disturb the status quo, which—as discussed above—unquestionably recognized the availability of private actions to enforce Medicaid provisions.[11]

Although *Wilder* addressed whether the Boren Amendment was enforceable under § 1983, rather than through a nonstatutory action under the Supremacy Clause, its reasoning is nonetheless instructive in demonstrating why providers are proper parties to bring the instant action. *Wilder*'s reasoning

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[11] The only door that § 1320a-2 kept shut was one that the *Suter* Court had closed: the Child Welfare Act's "reasonable efforts" provision would continue to provide no privately enforceable federal right. 42 U.S.C. § 1320a-2 ("[T]his section is not intended to alter the holding in [*Suter*] that [the "reasonable efforts" provision] is not enforceable in a private right of action.").

also shows that Section 30(A) accords rights for providers to vindicate through the Supremacy Clause. The Boren Amendment was structurally similar to the current Section 30(A) in that it imposed requirements on payment levels to providers. That structure yielded a part procedural, part substantive right: a right to "the adoption of reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility that provides care to Medicaid patients." *Wilder*, 496 U.S. at 510; see *ibid.* ("The right is not merely a procedural one that rates be accompanied by findings and assurances (however perfunctory) of reasonableness and adequacy; rather the Act provides a substantive right to reasonable and adequate rates as well."). Like the Boren Amendment, the equal access mandate (1) creates a part procedural, part substantive right—*i.e.*, the right to equal access and the procedures to safeguard that access; (2) gives states a large amount of discretion; (3) has the Secretary play a role in oversight; and (4) contains broad, discrete factors for states, the Secretary, and the judiciary to balance in determining whether a plan provides "equal access."

Because of these structural similarities, myriad courts (including the First, Third, Fifth, and Eighth Circuits) held that Section 30(A) could be enforced under § 1983 in the wake of *Wilder*.[12] Following *Gon-*

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[12] See, *e.g.*, *Pa. Pharmacists Ass'n* v. *Houstoun*, 283 F.3d 531 (3d Cir. 2002) (en banc) (Alito, J.); *Evergreen Presbyterian Ministries, Inc.* v. *Hood*, 235 F.3d 908 (2000), *overruled by Equal Access for El Paso, Inc.* v. *Hawkins*, 509 F.3d 697 (5th Cir. 2007); *Visiting Nurse Ass'n of N. Shore, Inc.* v. *Bullen*, 93 F.3d 997 (1996), *overruled on other grounds by Long Term Care*

zaga University v. *Doe*, 536 U.S. 273 (2002), courts have divided on whether § 1983 is an appropriate vehicle for enforcement of Section 30(A). The Eighth Circuit has held that § 1983 remains an appropriate vehicle,[13] while the First, Fifth, Sixth, and Ninth Circuits have held that § 1983 is not available as an enforcement tool because of *Gonzaga*.[14] But the Ninth Circuit properly held in this case that even if § 1983 is not a proper enforcement vehicle, such a holding does not preclude private enforcement through appropriate nonstatutory causes of action, like those employed in the cases discussed in *Wilder*. Pet. App. 2–3; see also *Indep. Living Ctr. of S. Cal.* v.

Pharmacy Alliance v. *Ferguson*, 362 F.3d 50 (1st Cir. 2004); *Ark. Med. Soc'y, Inc.* v. *Reynolds*, 6 F.3d 519 (8th Cir. 1993).

[13] See *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006), *judgment vacated in part on other grounds by Selig* v. *Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007).

[14] See, *e.g.*, *Mandy R.* v. *Owens*, 464 F.3d 1139 (10th Cir. 2006); *Westside Mothers* v. *Olszewski*, 454 F.3d 532 (6th Cir. 2006); *Sanchez* v. *Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50 (1st Cir. 2004). These courts treated *Wilder* as anomalous, misperceiving the decision as addressing a one-off provision requiring "States to pay an 'objective' monetary entitlement to individual health care providers," *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 280 (2002), a description in considerable tension with *Wilder* itself. *Wilder*, 496 U.S. at 510. Cf. *Mandy R.*, 464 F.3d at 1148 (describing *Gonzaga*'s treatment of *Wilder* as a recharacterization of the right in question). To the circuits finding no right under § 1983, *Gonzaga* has been viewed as license to disregard past precedent. *Long Term Care*, 362 F.3d at 59 ("If *Gonzaga* had existed prior to *Bullen*, the panel could not have come to the same result. Whether *Gonzaga* is a tidal shift or merely a shift in emphasis, we are obligated to respect it, and it controls this case.").

Maxwell-Jolly, 572 F.3d 644, 653–654 (9th Cir. 2009) (discussing the continued vitality of Supremacy Clause actions to enforce Section 30(A), even in light of Ninth Circuit caselaw barring enforcement through § 1983), *vacated and remanded sub. nom. Douglas* v. *Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204 (2012). The long history of private enforcement and Congress's repeated indications that it expected such enforcement strongly suggest that, at a minimum, a direct action under the Supremacy Clause should be available to enforce the equal access mandate.

II. Because HHS Has Presumed Private Enforcement of the Medicaid Act, the Agency Cannot Realistically Enforce the Act Alone

Unsurprisingly, beneficiaries and providers have consistently relied on the presumption that the equal access provision can be privately enforced. But so too has HHS. Every aspect of the enforcement scheme—starting with the regulations the Department promulgates down to the annual budget for Medicaid administration—is shaped around the understanding that private parties will shoulder much of the enforcement burden. Not only is the Government's suggestion that Congress intended Section 30(A) to be exclusively enforced by HHS logistically unfeasible, it is belied by the limited regulatory scheme currently in place.

A. HHS's Scant Administrative Resources For Implementing the Medicaid Program Reflect the Department's Understanding That Its Enforcement Role Is Limited

HHS has fewer than 500 employees devoted to administering over $300 billion in federal funds for 56 state-level Medicaid programs.[15] Out of necessity, most of HHS's employees are tasked with bookkeeping and routine management of Medicaid funds at the state level. Few are responsible for the review of state plans and plan amendments for Section 30(A) compliance.

HHS cannot afford to be the exclusive enforcer of the equal access mandate. As of the most recent fiscal year, CMS has $156 million to administer Medicaid—a $304-billion program in which 20% of Americans are enrolled. Centers for Medicare & Medicaid Services, *Financial Report: Fiscal Year 2014*, at 6, 60 (2014) ("*FY 2014 CMS Report*"). In other words, CMS has less than $2.44 per beneficiary to coordinate with 56 states and territories in implementing and overseeing a complex scheme of benefits. And while the Medicaid program receives hundreds of billions of dollars each year, the vast majority of that money is committed to funding services—i.e., "mandatory" spending that cannot be used for administrative costs, which fall under the category of "discretionary" spending and must therefore be appropriated on an annual basis by Congress.

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[15] All 50 states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands administer a Medicaid program.

But even if HHS sought to increase such appropriations, expanding CMS's administrative budget would be no easy task. CMS must annually compete with nine other agencies—including agencies far more likely to be the subject of congressional munificence such as the Centers for Disease Control, the Food and Drug Administration, and the National Institutes of Health—for a limited pool of discretionary funds.

Moreover, recent events suggest HHS is highly unlikely to increase CMS's administrative budget for more robust enforcement of Section 30(A). Since this Court's decision in *Douglas* v. *Independent Living Center*, 132 S. Ct. 1204 (2012), 27 states and the District of Columbia have voluntarily expanded their Medicaid programs pursuant to the Affordable Care Act. That expansion, in turn, increased federal Medicaid outlays by $40 billion. Congressional Budget Office, *An Update to the Budget and Economic Outlook: 2014 to 2024*, at 10 (Aug. 2014). But despite the sharp spike in costs and total number of covered beneficiaries, CMS's administrative budget went *down* by $11 million compared to the previous fiscal year. See *FY 2014 CMS Report*, *supra*, at 61 (listing the fiscal year 2013 Medicaid administrative budget as $167 million).

And even if HHS suddenly shifted gears and directed its sparse resources to ensuring equal access, those resources would yield poor dividends. The Government gives the misleading impression that HHS uses its extensive expertise to carefully comb through the substance of a state's proposed plan or plan amendment to assess the level of access. Gov't Br. 24. The reality is that the review process is "cursory at best limited to whether the 'documenta-

tion submitted by the State Medicaid Agency complies with procedural requirements,'" *Amisub (PSL), Inc.* v. *Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 794 (10th Cir. 1989), partly owing to the fact that the Department has limited resources.

Manpower aside, HHS's enforcement mechanisms are either ineffective or rarely used. The plan approval process, for instance, is of questionable value in the rate reduction context. Though states are not to implement rate reductions before CMS has an opportunity to formally accept or reject a plan amendment, some do so anyway because the cuts do not require additional federal funds. See, *e.g.*, *Cmty. Pharmacies of Ind., Inc.* v. *Ind. Family & Soc. Servs. Admin.*, 816 F. Supp. 2d 570, 577 (S.D. Ind. 2011) (rejecting providers' suggestion that Indiana needed to wait for plan approval before implementing a rate reduction).[16] In any event, HHS is generally reluctant to pursue a compliance action while a state's plan amendment is pending approval. Instead, it attempts to preserve the status quo by deferring any payments required under the amendment until the approval process is complete. *Id.* at 578.

There is good cause for this reluctance. The "stick" of withholding funds that accompanies a compliance action ultimately does not punish the state, but the very people the Medicaid Act is meant to benefit. See

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[16] See Julia Bienstock, Note, *Administrative Oversight of State Medicaid Payment Policies: Giving Teeth to the Equal Access Provision*, 39 Fordham Urb. L.J. 805, 831 (2012) (concluding that the plan approval process is not an "effective tool[] for ensuring state compliance with the equal access provision . . . because states do not require additional federal matching dollars when they decrease rates").

Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1, 52 (1981) (White, J., dissenting) (explaining a reluctance to declare that an agency's ability to withhold funds necessarily forecloses a private right of action, as "a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act").[17] And once a compliance action is initiated, the Secretary has no choice but to withhold. See 42 U.S.C. § 1396c ("[T]he Secretary *shall* notify such State agency that further payments will not be made to the State " (emphasis added)). Therefore, a compliance action is an effective enforcement mechanism only in theory. In practice, a state's noncompliance creates a damned-if-you-do, damned-if-you-don't scenario where the withholding of state funds will lead to depriving the poor of essential medical assistance.[18] As this Court explained in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012), the Secretary's ability to

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[17] See Brian J. Dunne, Comment, *Enforcement of the Medicaid Act Under 42 USC § 1983 after* Gonzaga University v. Doe: *The "Dispassionate Lens" Examined*, 74 U. Chi. L. Rev. 991, 994–995 (2007) (explaining the "general reluctance by federal agencies to police states by withholding program funding" as applied to CMS and Medicaid). Cf. *Arthur C. Logan Mem'l Hosp.* v. *Toia*, 441 F. Supp. 26, 27 (S.D.N.Y. 1977) ("The Secretary can withhold payment or he can negotiate with a State. He cannot compel compliance.").

[18] See Br. of the United States as *Amicus Curiae* at 13 n.11, *Exeter Mem'l Hosp. Ass'n* v. *Belshe*, 943 F. Supp. 1239 (E.D. Cal. 1996) (No. 96-693) ("A compliance action, which results in the withholding of [federal funds], has a potentially detrimental effect on Medicaid recipients and providers. If HCFA were to withhold [funds] pursuant to a compliance action, recipients may well be deprived of medical assistance because the State may no longer be able to provide certain services.").

withhold all of a state's Medicaid funding is akin to a "gun to the head," in light of its essential role in the "intricate statutory and administrative regimes [developed by the states] over the course of many decades to implement their objectives under existing Medicaid." *Id.* at 2604.

B. HHS's Priorities Conflict With the Government's Position That the Department Should Be Solely Responsible for Enforcing the Entire Equal Access Mandate

HHS has historically viewed only one half of the equal access mandate as within its charge: the promotion of "economy" and "efficiency." The Department carries out these twin belt-tightening objectives by enforcing regulations such as the upper payment limit, "a Medicaid payment ceiling based on expenses that would be allowed under Medicare payment rules." *Minnesota* v. *CMS*, 495 F.3d 991, 994 (8th Cir. 2007); see also *Alaska Dep't of Health & Soc. Servs.* v. *CMS*, 424 F.3d 931, 935 (9th Cir. 2005) (explaining that "[Section] 30(A) has been the principal statutory authority for a series of upper payment limit [] regulations that cap state reimbursement rates to promote economy and efficiency" (citation and internal quotation marks omitted)). What follows is a plan approval process where "CMS often withholds approval of [state plan amendments] that seek to increase reimbursement rates in violation of Section 30(A) and the [upper payment limit],"[19] but

[19] Bienstock, *supra* note 16, at 832.

does nothing to block state efforts to *reduce* reimbursement rates.[20]

In the rare instance where HHS does intervene in a state's attempt to lower reimbursement rates, the Department's process of addressing its concerns is an informal one.[21] Indeed, a proposed rule interpreting Section 30(A) shows HHS not only tolerates state cost-cutting efforts, but encourages them to the point where the Department will not stand in the way of the states. Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26,342, 26,343 (May 6, 2011) ("Achieving best value has been a key strategy for some States that have attempted to reduce costs in the Medicaid program. We do not intend to impair States' ability to pursue that goal."). The rule also illustrates HHS's *lack* of interest in the equal access mandate's other requirements—namely, "quality of care" and sufficiency of access. Though the rule provides a framework for evaluating these criteria, that framework gives states considerable leeway and is part of a state's *self-conducted* access review. *Id.* at 26,345.[22]

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[20] Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. Davis L. Rev. 413, 462 (2008).

[21] Br. of the Sec'y of Health & Human Servs. as *Amicus Curiae* at 12, *Clark* v. *Kizer*, 758 F. Supp. 572 (E.D. Cal. 1990) (No. 87-1700) ("HHS regional officials have sought to monitor and promote access through informal processes, principally by raising the issue of the adequacy of rates in meetings and correspondence with state authorities.").

[22] See also Brietta R. Clark, *Medicaid Access, Rate Setting and Payment Suits: How the Obama Administration is Undermining Its Own Health Reform Goals*, 55 How. L.J. 771, 837–838 (2012) (explaining that "the most impactful decisions

The current and proposed regulations implementing the equal access mandate only further evince HHS's understanding that it is not the exclusive (or even primary) safeguard for ensuring every aspect of the mandate. HHS's limited enforcement resources and its budget are accordingly rooted in—and reflective of—that understanding, rendering exclusive enforcement entirely unfeasible. The Government's position would therefore eviscerate one of the Medicaid Act's central mandates.

III. The Government's Other Arguments Are Without Merit

A. The Equal Access Provision Is Judicially Administrable

The Government also argues against private enforcement of Section 30(A) on the ground that its standards are too vague and ambiguous to be judicially enforced. This Court rejected a similar contention in *Wilder*, and it should likewise reject the Government's argument here.

First, this Court has already concluded judges are competent at weighing broad factors nearly identical to the ones in Section 30(A). In *Wilder*, the Court observed the Boren Amendment required evaluation of four criteria: two objective, two subjective. "Efficiency" and "economy" were considered parts of an "objective benchmark" integral to the ratemaking analysis. See 496 U.S. at 519. "Reasonableness" and "adequacy" were subjective considerations that gave the

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with respect to the quality of the rate-setting process . . . are all left to state discretion" and that the "guidance and discussion" provided by the proposed rule are "merely advisory").

states "substantial discretion in choosing among reasonable methods of calculating rates." *Id.* at 519–520. Despite the general nature of the terms used to set forth these criteria, the Court found review of such qualities to be "well within the competence of the Judiciary." *Id.* at 520.

Section 30(A) presents a similar combination of objective and subjective components. The terms used by Section 30(A) are no more "vague and amorphous" than the ones found judicially administrable by the *Wilder* Court. "Efficiency" and "economy" are objective touchstones, as they were in the Boren Amendment. Judges can refer to HHS's established standards for discerning whether a plan is efficient and economical. See, *e.g.*, 42 C.F.R. § 447.272(b).

The statute also allows for subjective considerations subject to state discretion, e.g., the relative "quality of care" and the rate levels that would "enlist" a sufficient number of providers. And again, judges can follow whatever standards HHS selects for determining whether a state plan meets these criteria. Cf. 76 Fed. Reg. at 26,344 (proposing a "three-part framework for analyzing access to care which considers: (1) Enrollee needs; (2) the availability of care and providers; and (3) utilization of services."

Second, the weight of Section 30(A) caselaw proves judges can competently decide whether the provi-

sion's terms have been satisfied.[23] The existence of *any* meaningful body of caselaw undercuts the Government's argument.

Indeed, in the immediate wake of the equal access mandate's enactment, HHS not only acquiesced to judicial administration of Section 30(A), it actively participated in the process. See, *e.g.*, *Clark* v. *Kizer*, 758 F. Supp. 572, 576 (E.D. Cal. 1990) (describing the "multi-factor approach for measuring compliance with the equal access regulation" proposed by HHS in an amicus brief), *rev'd and remanded on other grounds sub nom. Clark* v. *Coye*, No. 92-15131, 1992 WL 140278 (9th Cir. June 23, 1992). The Government, of course, is free to change its mind and contend that judicial administration of Section 30(A) is impossible. But the about-face is an untenable one, especially because the Government's position presupposes an uptick in litigation in which states challenge plan denials (or compliance proceedings) grounded in a violation of Section 30(A). The Government is, in essence, arguing that judges cannot "decide questions of compliance with Section 30(A)," because "different evidentiary records [will] re-

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[23] See *Rite Aid of Pa., Inc.* v. *Houstoun*, 171 F.3d 842, 853–856 (3d Cir. 1999) (declaring a Pennsylvania plan to be arbitrary and capricious for giving "some of the section 30(A) factors more attention than others"); *Fla. Pharmacy Ass'n* v. *Cook*, 17 F. Supp. 2d 1293, 1301 (N.D. Fla. 1998) (determining there was a right to "enough providers" but the record did not evince a violation); *Stephens* v. *Childers*, No. 94-75, 1994 WL 761466, at *8 (E.D. Ky. Nov. 4, 1994) (enjoining a state plan because "[t]he defendants failed to assess the level of care available to the insured population"); *Ohio Hosp. Ass'n* v. *Ohio Dep't of Human Servs.*, 579 N.E.2d 695, 699 (Ohio 1991) (invalidating a state Medicaid law because "it [did] not meet the requirements of the Medicaid statute").

sult[] in different factual findings," Gov't Br. 25, though they have competently done so for decades, see, *e.g.*, *Christ the King Manor, Inc.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 730 F.3d 291, 309–314 (3d Cir. 2013) (concluding HHS approval of a state plan was arbitrary and capricious because it failed to consider "quality of care"), and would continue to do so in the state appeals the Government's position would likely provoke.

It may well be true that a provider suing to enforce the equal access provision bears a heavy burden of proof. After all, HHS's enforcement framework gives states some leeway in making judgment calls about access. It is possible that a provider will prevail only in cases where there are "extreme disparities in access for Medicaid beneficiaries." Brietta R. Clark, *Medicaid Access, Rate Setting and Payment Suits: How the Obama Administration is Undermining Its Own Health Reform Goals*, 55 How. L.J. 771, 825 (2012) (citing *Clark*, 758 F. Supp. at 580). But there is a world of difference between a case that is difficult to prove because the applicable framework sets a high bar, and one that is impossible to prove because there is no discernible framework at all. Cases addressing Section 30(A) clearly fall into the former category.

Finally, the Government errs by viewing private rights of action and agency oversight as competing, and not complementary, modes of enforcement. The "predictive and policy judgments" made by HHS in its "expert role" are doubtless deserving of deference. *See* Gov't Br. 14. Private enforcement of Section 30(A), however, does not mean this deference is abandoned or otherwise jeopardized. Courts *must* defer to HHS's reasonable interpretation of how to

discern "equal access," as with any other ambiguous language within the Medicaid Act.[24] HHS's role of applying its expertise and policy judgments is not compromised when judges follow the guideposts the Department erects.[25] See, *e.g.*, 42 C.F.R. § 447.253 (implementing Section 30(A)). And if courts interpret Section 30(A) before HHS has had an opportunity to weigh in, the Department is not bound by these prior judicial pronouncements. Cf. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982–983 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). In no way is the agency's expert role endangered by allowing for private enforcement.

For many federally administered programs, the agency *should* be the exclusive enforcer of the statutory and regulatory scheme; uniformity is key to "avoid[ing] the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages." *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring). But Medicaid is dif-

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[24] See, *e.g.*, *Pharm. Research & Mfrs. of Am.* v. *Thompson*, 362 F.3d 817, 821–822 (D.C. Cir. 2004); *West Virginia* v. *Thompson*, 475 F.3d 204, 212–213 (4th Cir. 2007); *Harris* v. *Olszewski*, 442 F.3d 456, 466–467 (6th Cir. 2006); *S.D. ex rel. Dickson* v. *Hood*, 391 F.3d 581, 595–596 (5th Cir. 2004).

[25] Given HHS's limited resources and its mission to promote efficiency and economy in state Medicaid programs, it is highly unlikely that HHS will promulgate regulations specifically defining the quality-of-care and sufficient-providers aspects of Section 30(A). See *supra* part II.

ferent. It is not a statutory scheme of single administration. Congress intended some discord when it rejected a single, harmonious federal system in favor of a patchwork of 56 different programs. Cf. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2629–2630 (Ginsburg, J., concurring in part and dissenting in part) ("Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law."). As HHS has long understood, an essential part of what threads that patchwork together is the needle of private enforcement.

B. The Spending Clause Does Not Bar Private Enforcement of the Medicaid Act

Because the Medicaid Act is a Spending Clause law, the Government cryptically advances the analogy that Medicaid beneficiaries and providers are like incidental third-party beneficiaries to a contract, with no right to enforce the contract's terms. Gov't Br. 22. But that analogy does not hold up.

While this Court has held that Spending Clause legislation operates "*much* in the nature of a contract," *Pennhurst*, 451 U.S. at 17 (majority opinion) (emphasis added), that simply means states may agree to do things in exchange for federal funds that Congress could not compel them to do directly. This does not mean, however, that a Spending Clause law *is* a contract or that contract law principles should be unflinchingly applied to the interpretation of such laws. See *Westside Mothers v. Haveman*, 289 F.3d 852, 858 (6th Cir. 2002).

And in any event, contract law principles *support* provider enforcement of the equal access provision. It is untenable for the Government to say that providers are merely *incidental* beneficiaries, much like a bystander who benefits from a stroke of good fortune. See Restatement (Second) of Contracts § 302 cmt. e, illus. 16 (1981). The entire Medicaid framework is meant to address the needs of recipients and providers. Section 30(A) "evince[s] a congressional concern for preserving financial incentives to providers—by ensuring adequate reimbursement payment levels." *Visiting Nurse Ass'n of N. Shore, Inc.* v. *Bullen*, 93 F.3d 997, 1004 (1996), *overruled on other grounds by Long Term Care Pharmacy Alliance* v. *Ferguson*, 362 F.3d 50 (1st Cir. 2004). Therefore, even under contractual principles, providers are intended beneficiaries who should accordingly be able to enforce the Medicaid Act's terms—especially in actions, such as this one, seeking injunctive relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

List of *Amici Curiae*, Former HEW/HHS Officials

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Secretary, HEW (1977-1979)

RICHARD COTTON, PH.D.
Deputy Executive Secretary, HEW (1977-1978);
Executive Secretary, HEW (1978-1980)

PETER EDELMAN
Counselor to the Secretary, HHS (1993-1995);
Assistant Secretary for Planning and Evaluation, HHS (1995-1996)

JUDITH M. FEDER
Principal Deputy Assistant Secretary for Planning and Evaluation, HHS (1993-1995)

MICHAEL HASH
Deputy Administrator, HCFA (1998-2000);
Acting Administrator, HCFA (2000);
Director, HHS Office of Health Reform (2011-2014)

NAN D. HUNTER
Deputy General Counsel, HHS (1993-1996)

RENÉE M. LANDERS
Acting Deputy General Counsel, HHS (1996);
Deputy General Counsel, HHS (1996-1997)

KAREN POLITZ
Deputy Assistant Secretary for Health Legislation, HHS (1993-1997);
Director, Office of Consumer Support, Center for Consumer Information and Insurance Oversight, CMS (2010-2011)

HARRIETT S. RABB
General Counsel, HHS (1993-2001)

DAVID SATCHER, M.D., PH.D.
U.S. Surgeon General (1998-2002);
Assistant Secretary for Health, HHS (1998-2001)

HON. DONNA E. SHALALA
Secretary, HHS (1993-2001)

HELEN L. SMITS, M.D.
Deputy Administrator, HCFA (1993-1996);
Chief Medical Officer, HCFA (1993-1996)

BRUCE C. VLADECK, PH.D.
Administrator, HCFA (1993-1997)

TIMOTHY M. WESTMORELAND
Director of Center for Medicaid and State Operations, HCFA (1999-2001)

RECORD
AND
BRIEFS

No. 14-15

In The

Supreme Court of the United States

RICHARD ARMSTRONG and LISA HETTINGER,

Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF FOR MEDICAID DEFENSE FUND IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus, the Medicaid Defense Fund (MDF), is a nonprofit public interest law foundation, located in San Rafael, California, which is organized to secure, for charitable purposes, civil and economic rights of health care consumers, especially but not limited to their rights under the federal Medicaid Act.

To that end, MDF has freed up at least $400 million in funding for Medicaid programs in litigation sponsored and supported by MDF during 2004 through the present, in California to pay:

– pharmacies in the case of *Clayworth v. Bonta,* 295 F.Supp.2d 1110 (E.D. Cal. 2003), (preliminary injunction enjoining 5% cut to pharmacies in the Medicaid program in California);

– physicians, dentists, pharmacies, optometrists, adult health care centers, non-emergency medical transporters (NEMT), and home health agencies in *Independent Living Center v. Shewry,* 543 F.3d 1047 (9th Cir. 2008); *Independent Living Center v. Maxwell-Jolly,* 572 F.3d 644 (9th Cir. 2009);

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[1] This amicus curiae brief is filed pursuant to Consent to the filing of amicus curiae briefs in support of either party or of neither party, filed by counsel for Petitioners on November 17, 2014, and by Respondents on November 19, 2014. (Docket, Case No. 14-15). No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

(preliminary injunction enjoining 10% cut to these Medicaid providers); vacated without prejudice in *Douglas v. Independent Living Center,* 132 S.Ct. 1204 (2012); appeal vol. dismissed, August 2014; settlement approved by District Court (2014), pending CMS approval; (with providers retaining all payments received under the preliminary injunction);

– pharmacies, in *Managed Pharmacy Care v. Maxwell-Jolly,* 603 F.Supp.2d 1230 (2009); (preliminary injunction enjoining 5% cut to Medicaid pharmacies); vacated without prejudice in *Douglas v. Independent Living Center,* 132 S.Ct. 1204 (2012); appeal vol. dismissed, August 2014; settlement approved by District Court (2014), pending CMS approval; (with providers retaining all payments received under the preliminary injunction);

– pharmacies, in *California Pharmacists Assn. v. Douglas* 2:09-CV-08200 (C.D. Cal. 2010); (preliminary injunctions restraining Maximum Allowable Cost pharmacy payment reduction, and restraining Upper Billing Limit on Medi-Cal pharmacy payments); appeal pending.

A victory in this case by the Petitioners on the Question Presented would be ruinous to thousands of pharmacies and other providers in California, and worse, compromise if not destroy access to quality health care for millions of Medicaid beneficiaries in California, for whom the Medicaid Defense Fund is pledged to protect in the courts to the extent possible.

FACTUAL AND LEGAL BACKGROUND

The facts and the legal background of this case are set forth in the respective briefs filed by the Petitioners and the Respondents in this case.

SUMMARY OF ARGUMENT

Important principles compel the conclusion that the Medicaid provider Respondents have a cause of action under the Supremacy Clause to prevent injury from continuing action of the defendant state official, contrary to federal law.

The first principle is that law is not limited to just that part which deals with the withholding of rights, but, also includes the part of law which relates to remedies to prevent injury to cognizable interests of persons.

See Marbury v. Madison, 5 U.S. 137, 163 (1803),[2] and *Western Pacific, Cal. R. v. Southern Pacific Co.*, 284 U.S. 47, 51-52 (1931),[3] for the general proposition

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[2] [I]t is a settled and invariable principle in the laws of England that *every right, when withheld*, must have a remedy, and *every injury its proper redress.*

(Emphasis supplied).

[3] A person is a "party in interest":

. . if the bill discloses that some *definite legal right* possessed by the complainant *is seriously threatened or* that the unauthorized and therefore *unlawful*

(Continued on following page)

that relief may be had for injury to a cognizable interest of the plaintiff, not merely, only for the withholding of a right. So that a plaintiff is not out of court if he or she has no "right" created by Congress, if the plaintiffs sue – as in case at bar – to prevent injury under the injury branch of law, in which relief is granted under the equity jurisdiction of the courts.

See Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 119 (1989) (Kennedy, J., dissent), and two circuit cases – *Western Air Lines, Inc. v. Port Auth. of NY and NJ,* 817 F.2d 222 (2d Cir. 1987), and *Burgio and Camofelice, Inc. v. NYS Dept. of Labor,* 107 F.3d 1000, 1006 (2d Cir. 1997) – as typical opinions which rule that injunctive relief is available to prevent injury from a State officer's action contrary to federal law, despite absence of any Congressionally-created right.

Thus Kennedy, J., asserted that:

> By concluding that Golden State may not obtain relief under § 1983, we would not leave the company without a remedy. § 1983 does not provide the exclusive relief that the federal courts have to offer. [P]laintiffs may vindicate pre-emption claims by seeking equitable relief in the district court through their powers under the federal

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> *action* of the defendant . . . *may directly and adversely affect* the complainant's welfare.

(Emphasis supplied).

> jurisdictional statutes. See 28 U.S.C. § 1331 (1982 ed.); 28 U.S.C. § 2201; 28 U.S.C. § 2202 (1982 ed.).

(*Golden State,* 493 U.S. at 119).

Western Air Lines explained, 817 F.2d at 225:

> A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law.

(817 F.2d at 225), and:

> The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments. . A claim under the Supremacy Clause simply asserts that a federal statute has taken away local authority. In contrast, an implied private right of action is a means of enforcing the substantive provisions of a federal law.

(817 F.2d at 225-226), and:

> The question whether the Supremacy Clause may be used as a sword in bringing a § 1983 action is, of course, different from that decided in the affirmative by the Supreme Court in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) – whether the Supremacy Clause may be

> invoked as a shield against the imposition of state taxes

(817 F.2d at 226).

Essentially, the Question Presented and Petitioners' Opening Brief are strawmen which, by confining themselves to the irrelevant issue of whether Medicaid providers have any Congressionally-created "right," ignore the established law of remedies to prevent injury: namely, that no Congressionally-created "right" is required of a plaintiff, to obtain injunctive relief under equity jurisdiction of the courts, to prevent injury from continuing action, contrary to law, of any public official (be the official a federal officer or a State officer).

Second, the historical precedent is that the king – (here, a State) – must obey the law of the land and his officers may not injure any person except under the law of the land. (Magna Carta, 39 (nor will we go upon him nor send against him, except by the law of the land); Hamburger, *Law and Judicial Duty,* 194-208, 216-217, 609 (2008).

Logically, without need of the Supremacy Clause, this fundamental principle embodied in federal law applies, by adoption of the Constitution by the people of each of the States, to both federal officers and State officers alike. (As to States, *see* The Federalist, No. 33, p. 205 (C. Rossiter ed. 1961) (A. Hamilton) (the Supremacy Clause "only declares a truth which flows

immediately and necessarily from the institution of a federal government); *Law and Judicial Duty,* 595.[4]

Under this common law principle, a State officer (the Petitioner Armstrong), who violates the law of the land (here, 42 U.S.C. § 1396a(a)(30)(A) – "Section 30(A)" – and the State plan, by not paying the rates specified by the State plan, in violation of Section 30(A), is stripped by the *ultra vires* character of the act of all powers to so act; so that persons injured thereby – i.e., Medicaid providers who are paid less than the federally imposed legal rate for their services – have a historically grounded cause of action under the equity jurisdiction of the courts to prevent, by injunctive relief, the irreparable injury of having to repeatedly sue the State to obtain the federally imposed legal rates as well as the irreparable injury of being prevented, by insufficient payments, from furnishing quality services to beneficiaries as required by Section 30(A).

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[4] As Hamilton put it, the new constitution extended "the authority of the union to the persons of the citizens," and thus rather than have to act "by military force" against the states, the government could exert itself "by the agency of the Courts" on individuals. This was the "COERCION of the magistry" instead of the "COERCION of arms." (*Id.* at 595).

Hamburger's thesis is that the Supremacy Clause merely made explicit what was already implicit in the Constitution, and was only added to ensure there was no dispute that by the Constitution, the law of the land – i.e., federal law was supreme throughout the country, any state law to the contrary. (*Id.* at 595-596).

See Pennhurst School and Hospital v. Halderman, 465 U.S. 89, 104-105 (1984):

> [A]n official who acts unconstitutionally is stripped of his official or representative character, *[Ex parte] Young*, 209 U.S. 123, 160 (1908)[5] . .
>
> [T]he *Young* doctrine has been accepted as necessary to hold state officials responsible to the supreme authority of the United States. *Young, supra,* at 160.

Hence the fact, if it be a fact, that there is no Congressionally-created "right" in case at bar, is irrelevant in this case, which goes off on principles entirely unrelated to whether the plaintiff provider has a Congressionally-created "right" or not.

Third, the system of federalism implicitly created by the structure of the Constitution (*New York v. United States,* 505 U.S. 144 (1992); *Prinz v. United States,* 521 U.S. 898 (1997); and *Bond v. United States,* 131 S.Ct. 2355, 564 U.S. ___ (2011), was created for the benefit of the citizens of this country to preserve their liberty, by preventing any actor in the system – let alone sets of actors – from gaming the system to their advantage, contrary to the applicable laws enacted by Congress, to the oppression or injury of citizens.

See New York, 505 U.S. at 182-183.

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[5] 209 U.S. 123, 160 (1908).

Also see Bond, 131 S.Ct. at 2363-2364:

> Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.

and:

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.

Note: that reimbursement at less than the federally mandated amount, calculated as required by Section 30(A) and as required by the State Plan approved by CMS, is ongoing injury to Medicaid providers in case at bar.

And, to require the providers to repeatedly sue, each time that they are reimbursed less than the rates mandated by Section 30(A) and/or by the State Plan, is deemed, in equity, to be irreparable injury in and of itself.

Indeed, in view of the fact that milk producers had standing in *Stark v. Wickard,* 321 U.S. 288, 304-305 (1944) to be paid at rates mandated by Congress, so also do the Medicaid providers in case at bar have a similar injury, with right to sue to prevent being

injured by payments at less than the federally mandated rates:

> It is only when a complainant possesses something more than the general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. We deem it clear that these producers have such a personal claim as justifies judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations, which this Court upheld in *Columbia Broadcasting System v. United States,* 316 U.S. 407. In the present case a reexamination of the facts and the statute and Order will show that delivering producers are assured minimum prices [by the milk payment statute in question] for their milk. The Order directs the handler to pay [the milk producer] that minimum.

Hence, Medicaid providers (for themselves and for the benefit of their beneficiary patients), have a cause of action, to vindicate and preserve the federalism system, for injunctive relief to prevent injury from continued action of the defendant officials which is contrary to both the requirements of Section 30(A) and the Act's requirement that a State operate its federally-funded Medicaid program in compliance with the State plan approved by CMS.

Summary and observation

The claim of the Petitioner's Brief – *that under the continued failure of CMS* to cut off all federal funding for the continuing violation of the Medicaid Act sued upon, that the State has a perfect right to deliberately continually flout federal law, and injure Medicaid providers – as well as injure beneficiaries in need of the services which Congress enacted them to receive – simply because Congress deigned not to enact any "rights" in providers – is judicially intolerable.

It might well be called the Marie Antoinette defense.

I.e., the position of the defendants is, that when the enforcement agency (here, CMS) fails to enforce the Medicaid Act, that we are free to violate and violate the Act, and injure and injure both Medicaid providers and their beneficiary patients by deliberately paying less than we have determined is the minimum payable under Section 30(A) and which minimum, to boot, has been approved by CMS.

This is especially contumacious where – as in case at bar – the case does not turn on whether Congress created any "enforceable rights," but, instead, turns on whether the traditional equity cause of action to prevent irreparable injury threatened by officials' violation of law, should continue to be so recognized and so sustained by the judiciary.

I.e., this extraordinary claim of Petitioners to be able to injure providers and beneficiaries with impunity, in violation of federal law – simply because another actor in the federalism system (CMS) chooses to continuously fail to enforce the Act – is flatly contrary to the bedrock principles above mentioned.

But even more troubling is that *both the State and CMS* are visibly gaming the federalism system, by acting in parallel, to their mutual monetary advantage, by the State violating the Act on the one hand, and CMS not cutting off federal funds to enforce the Act, on the other hand.

If the State of Idaho and CMS can thereby, by parallel action, willfully shred the federalism system in respect to Medicaid providers, to their monetary advantage, in continued violation of the Act – on the basis that providers may not sue to prevent injury to themselves or their beneficiary patients for whom they sue *jus tertii* – then all the other States and CMS can do the same in respect to all the remaining Social Security Act programs for the aged, infirm, and permanently injured of this country.

That is the grisly view from the promenade of the case at bar. This honorable Court should and must not permit the destruction of the federalism system, which the State and the Obama Administration, through CMS and the Solicitor General, propose to the Court, which will greatly injure millions of aged, disabled poor throughout the country.

ARGUMENT

I. The principle, that the king must obey his own laws, and that an officer who proposes to disobey the law of the land is thereby stripped, in equity, of all powers to so act to the injury of persons, has already been embedded *sub silencio* into federal jurisprudence in respect to federal officers. This principle should likewise, for the same reasons, be articulated and applied in State officer cases, such as the case at bar.

See injunctions to prevent injury from violation of federal law by a federal officer, in none of which the Respondents possessed any rights enacted by the statute being violated:

– *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94, 108 (1902):

> The acts of all officers must be justified by some law and in case an officer violates the law to the injury of an individual the courts generally have jurisdiction to grant relief. (187 U.S. at 108).

– *Abbott Laboratories v. Gardner,* 387 U.S. 136, 142-43 (1967): There is jurisdiction in equity for a suit to restrain the F.D.A., to prevent injury to a plaintiff, from implementing a regulation adopted contrary to the Federal Food, Drug, and Cosmetic Act of 1938. (387 U.S. at 142-43).

Essentially, the Administrative Procedure Act (A.P.A.), as initially enacted, was merely declaratory of existing case law. As stated in *Abbott Laboratories*, 387 U.S. at 142-143, the Department of Justice advised Congress in 1938 during the legislative process which resulted in the A.P.A., that:

> [E]ven without any express provision in the [A.P.A.] any citizen aggrieved by any order of the Secretary, who contends [an] order is invalid, may test the legality of the order by bringing an injunction suit against the Secretary, the head of the Bureau, under the general equity powers of the court. 83 Cong. Rec. 7892 (1938).

By parity of reasoning, these basic principles apply *ipso facto* to cases such as the case at bar, where it is State officers, not a federal officer, who are violating federal law.

In essence, the test is not whether the plaintiff has a Congressionally-created *right*, but rather, will the plaintiff be *adversely affected* by the officer's *ultra vires* action.

Cases of violation of a federal law by a State officer:

The following are cases in which injunctions issued to prevent injury from State officials' acts contrary to federal law, which threatened to injure the plaintiffs:

– In the *Golden State* case, 493 U.S. at 119, Justice Kennedy (dissenting) concluded that although the plaintiff union had no *rights* under the federal law in question, that nevertheless, the plaintiff had a cause of action for injunctive relief under the equitable powers of the courts.

– In *King v. Smith,* 392 U.S. 309 (1968), (Social Security Act, Title IV),[6] injunction issued to prevent injury to AFDC recipients, from implementing a State law contrary to the Act.

– In *Rosado v. Wyman,* 397 U.S. 397 (1970), (Social Security Act, Title IV), injunction issued to prevent injury to AFDC recipients from implementing a State law contrary to the Act.[7]

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[6] Because *King* was pleaded as an Equal Protection claim under the jurisdiction afforded by § 1983, the Court ruled instead on the pendent Supremacy Clause claims first (which was called a "statutory claim") so as to avoid if possible having to address and rule upon the pleaded Bill of Rights claim.

But a "statutory claim," where the plaintiff alleges injury from State violation of a federal statute, is, by any name, a preemptive Supremacy Clause cause of action.

[7] The Court exercised pendent jurisdiction to adjudicate the *Rosado* case the same as the Court adjudicated *King*: i.e., by deciding the underlying "statutory claim," – i.e., for injunction from State action in violation of federal law, which threatened to injure the plaintiffs: which by any other name is a preemptive Supremacy Clause cause of action.

See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. at 281 (1997) (An allegation of ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to seek injunctive relief).

– *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 356, 259 n.6.

– *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 485 (1983).

– *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

– *Ray v. Atlantic Richfield Co.*, 436 U.S. 151 (1978).

– *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 86 (1992).

– *P.G.&E. v. State Energy Res. Cons. & Dev. Comm.*, 461 U.S. 190 (1983).

– *Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

II. *Bond v. United States*, 131 S.Ct. 2355 (2011), resolves many issues in favor of the Respondents.

First. The theory of the Directors and the Government that a plaintiff must plead a "right" in order to maintain Article III standing and a cause of action under the Supremacy Clause, is completely trashed by the *Bond* decision. The Court held that Bond seeks to vindicate her own constitutional interests, and that an individual, in a proper case, can assert injury from

governmental action taken in excess of the authority that federalism defines. (*Id.*, 131 S.Ct. at 2363-2364).

Second. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939), in particular – so heavily relied on by the defendants – is rejected out of hand. (*Id.*, 131 S.Ct. at 2361-2364).

Third. *Bond* holds that an adverse effect from a State or federal agency's action in violation of the federalism system, as in case at bar, is injury which is sufficient for Article III standing and cause of action purposes if the injury meets Article III prudential requirements. (*Id.*, 131 S.Ct. 2366-2367).

Fourth. An individual has a direct interest in objecting to State laws that upset the constitutional balance between the Union and the States when the enforcement of these State laws, is contrary to supreme federal law, and causes injury to the individual that is concrete, particular, and redressable. (131 S.Ct. 2366-2367). In case at bar, the plaintiff Medicaid providers meet this test.

Fifth. The theory of the Director and the Government that because generally a plaintiff "cannot rest his claim on the legal rights or interests of others," that *ergo*, only the Government may assert a claim for the within State violations of Section 30(A), is irrelevant in case at bar.

This is because here the Medicaid providers are asserting their own injury from State government

action taken in excess of the limits on a State that federalism defines. (131 S.Ct. at 2363-64).

I.e., here the plaintiffs assert their own injuries (and the injuries of beneficiaries who are their patients, clients, or members for whom they are *jus tertii* virtual representatives), from State action which is in excess of a limitation on State authority that federalism defines).

NOTE:

The federalism defense was raised by Bond as a defense in proceedings commenced against Bond; whereas, in case at bar, the plaintiffs allege their Supremacy Clause defense in a preemptive suit in equity to prevent irreparable harm to themselves (as well as their beneficiary patients). Such preemptive suits in equity are commonplace, where the injury stems from the State's violation of a restriction placed upon it by federal law (constitutional or statutory).

Such preemptive suits to prevent irreparable injury are well established, under the equity jurisdiction afforded to the federal courts by Congress, and by jurisdiction afforded to the federal courts by 28 U.S.C. § 1331. *See, Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 281 (1997), (an allegation of an ongoing violation of federal law with request for prospective injunctive relief is ordinarily sufficient under *Ex parte Young,* 209 U.S. 123); *Golden State,* 493 U.S. at 119 (Kennedy, J., dissent); *Board of Liquidation v. McComb,* 92 U.S. 531, 540-541 (1876)

(Contracts Clause violation); *Allen v. Baltimore & Ohio R. Co.*, 114 U.S. 311 (Contracts Clause violation); John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997-999 (2008).

Conclusion

For the above reasons, the plaintiffs have Article III standing and a cause of action to obtain injunctive relief to prevent being injured from the Directors' preempted acts to implement Idaho law contrary to, hence preempted under the Supremacy Clause, by Section 30(A) and the Medicaid requirement of 42 U.S.C. § 1396a(a) that the Petitioner conform to the State Plan approved by CMS.

III. The Respondents also have a federalism cause of action, to prevent injury from the acts of the Directors contrary to, hence preempted under the Supremacy Clause by the supreme federal law, Section 30(A), and the State Plan conformance requirement of 42 U.S.C. § 1396a(a).

A

This cause of action is implicit in the federalism system created by the division, allocation, and limits of federal and state powers by the Constitution; hence shall be referred to in this brief as the "federalism cause of action."

Federalism is, simply, the allocation in the Constitution of powers to the national government, the

reservation of all other powers to the states, and the provisions, which include the Supremacy Clause, which allocate federal/state powers by limiting State powers, which created the boundaries between, and the spheres of power of the national Government, the States, and the three branches of the Government.

Central to federalism is the principle, which the Court has recognized since the beginning, that a State law must yield to a contrary federal law.

Also, the doctrine of federalism is based on the premise that the Constitution is not a compact between and for the benefit of sovereign governments, but, rather, was stated to be and was adopted by the People, for *their* protection. *New York,* 505 U.S. at 181:

> O'Connor, J.:
>
> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments **for the protection of individuals**.

(Boldface emphasis supplied).

B

de Tocqueville is informative on this subject

In *Democracy in America* (1839) de Tocqueville analyzed the allocations and the conflicts between federal and State powers.

He reported that a chief concern of the Framers was "to arm the Federal government with sufficient power to enable to resist, within its sphere, the encroachments of the several states," but, at the same time, to avoid confrontation of the Union directly against a State, wherever possible.[8]

He observed that to that end, that suits by private citizens were deemed to be the **means** by which State laws contrary to the interests of the Union could be attacked without having to bring in the Union as the litigant. Thus:

> The Americans hold that it is nearly impossible that a new law should not injure some private interests by its provisions. **These private interests are assumed** by American legislators **as the means of assailing such measures as may be prejudicial to the Union**, and it is to these [private] interests that the protection of the Supreme Court is extended.

(Boldface emphasis supplied).

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[8] *See,* Alexander Hamilton, prior cited on this point at Footnote 4.

Amicus comments that the true function of the Court, to preserve the federalism system when, as in case at bar, two of the primary actors are gaming the system to their mutual financial advantage (consisting of savings from less expenditures for Medicaid services), is to accept these providers – who are injured by *ultra vires* State and Government action – who come into the Court to seek preventive relief.

For, without such injured victims of federalism violations who sue to obtain injunctive relief to prevent prospective injury, the federalism system could not be maintained.

As per de Tocqueville, it is the private interests of these injured providers which alone is the means of assailing the measures at bar which are prejudicial to the Union, (namely, continual violation by defendants of Section 30(A) and the 42 U.S.C. § 1396a(a) requirement that the State comply with the State Plan approved by CMS).

Inclusion, rather than rejection of the Medicaid provider plaintiffs should therefore be the preferred goal of the Court, so as, by deeming that providers have standing and a cause of action, the Court can fulfill its constitutional mission of preserving the federalism system, despite the obvious gaming of the system, by (1) the payments below the standard approved by CMS, in violation of Section 30(A), and (2) the complicity failure of CMS to enforce the Medicaid Act by cutting off funding to Idaho's Medicaid program.

Conclusion as to the federalism cause of action

For the above reasons, the within federalism cause of action should be affirmed by the Court.

IV. The objections of the Petitioners that the State's acceptance of federal funding subject to the conditions of the Medicaid Act, constitutes a mere "contract," in which Medicaid beneficiaries are mere "incidental beneficiaries of a contract," is irrelevant to the case made by the Respondents.

Again the Petitioners misperceive the nature of an implied Supremacy Clause cause of action.

First

In a Supremacy Clause action, the preempting federal statute strips the officer of all authority and power to do the preempted acts complained of. The essence of the decree is the absence of all power in the defendant to adversely affect (i.e., injure) the plaintiff by the lawless acts complained of, not, whether the plaintiff was intended by the preempting statute or some putative "contract" to be benefitted.

Second

In *Golden State,* 493 U.S. at 118, Kennedy, J., dissenting, stated that the immunity afforded the taxi company by the stripping of the city, by the NLRA, of all authority and power to interfere in the labor

dispute between the company and the union, "**does not benefit the company as an individual**, but, instead results from the Supremacy Clause's separate protection of the federal structure and from the division of power in the constitutional system."

Thus, it makes no difference whatsoever in the Supremacy Clause claim of the plaintiffs, whether Congress in Section 30(A), or the "parties" to the "contract" intended to benefit Medicaid providers: because the **source of the immunity** afforded the plaintiffs is not the existence of any "right" created in them by Section 30(A) or the putative "contract," but, rather, the Supremacy Clause's protection of the federal structure by striking down and rendering void the preempted State action in question: which in turn renders the Directors powerless to implement the preempted State action of paying less than required by Section 30(A), including, paying less than the rates specified in the State Plan approved by CMS.

Conclusion on this point

For the above reasons it is irrelevant, in an implied Supremacy Clause cause of action, whether or not the plaintiffs were intended beneficiaries of the preempting federal law (here, Section 30(A)), or of some "contract" between the Government and the State.

V. The all-inclusive wording of the Supremacy Clause repels the construction proposed: that only "pre-enforcement" causes of action exist under the Supremacy Clause.

The words of the Supremacy Clause are clear: they include all preemption suits to prevent injury to a person from a State's violation of a supreme federal law, such as Section 30(A), not, just "pre-enforcement" suits in those limited cases in which the plaintiff's conduct is regulated by a State government.

Thus the Supremacy Clause states:

> *This Constitution, and the Laws of the United States* which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. (Emphasis supplied).

There being no words of limitation or exception from this clear sentence, it follows that the Clause applies to **all** preemption suits in equity which seek a remedy to prevent being injured from a State's violation of a federal law, **not, just to some** preemption suits – i.e., to only so-called "pre-enforcement suits."

Because this defense is contradictory to the plain meaning of the words of the Supremacy Clause, it should be rejected on this basis alone.

Also, the fundamental rule is that the judicial power extends to all cases arising under the constitution. *Marbury v. Madison,* 5 U.S. at 178.

Hence the judicial power of the Court cannot be withdrawn in respect to any class of Supremacy Clause preemptive suits – which is what the Director and the United States are asking the Court to do.

VI. The Court has ruled directly opposite of this unsupported new theory of the Petitioners and the Government: that only "pre-enforcement" causes of action exist under the Supremacy Clause.

Kennedy, J., dissenting, approved a preemption suit in *Golden State*, 475 U.S. at 119, in which the preempting statute, the NLRA, regulated the defendant's conduct, not, the plaintiff's conduct.

The Court in *Rosado,* 397 U.S. at 421, issued equitable relief in respect to a preemptive Supremacy Clause cause of action, which regulated defendant's conduct, not, the plaintiff's conduct.

In that case the preempting law was a provision of the Social Security Act, Title IV (AFDC) which regulated the conduct of the State of New York, not the plaintiff.[9]

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[9] See, *Rosado*, 397 U.S. at 399; 414-15; 421. Concurrence: Douglas J.:

(Continued on following page)

The Court in the Contract Clause Cases, issued equitable relief in preemptive Supremacy Clause actions in which the State, not the plaintiff, was regulated. *Board of Liquidation*, 92 U.S. 531; *Allen*, 114 U.S. 311. I.e., the Contract Clause *prohibited the State* from interfering with contracts, and did not regulate the successful plaintiffs at all.

These decisions and the view of Kennedy, J., refute the erroneous assertion that there is no preemptive Supremacy Clause cause of action in the universe except where the plaintiff sues to enjoin State regulatory action which regulated the plaintiff's conduct.

VII. The claim that the Medicaid Act foreclosed Supremacy Clause suits has already been rejected by the Court, several times.

There is no evidence in the text or structure of the Medicaid that Congress intended to specifically foreclose any ability of beneficiaries or providers to

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The claims below included the "statutory claim" that "the State's reduction in the overall level of payments . . . violated § 402(a)(23) of the Social Security Act," so that the district court had pendent jurisdiction to decide the federal law claim. (397 U.S.C. at 423-425).

Thus *Rosado* was a suit to enjoin State action in violation of federal law, in respect to which the preempted State action had nothing to do with regulating the conduct of the plaintiffs in that case.

sue to obtain a remedy under any provision of the Act. *See Blessing v. Freestone,* 520 U.S. 329, 346-348 (1997) (citing with approval holding in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 521 (1990), that federal government's power to reject state Medicaid plans or to withhold federal funding to States whose plans did not comply with federal law, accompanied by limited state grievance procedures for individuals, was insufficient to preclude reliance on a cause of action for preemption.

Also, *see,* the seminal case of *Rosado,* 379 U.S. at 420:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, (1967); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). We adhere to *King v. Smith*, 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief.

CONCLUSION

First: This amicus brief addresses only the most important issues in this case. We do not purport to analyze all the other issues raised in this important case.

Second: For the reasons given, the Court should affirm the Ninth Circuit decision in this case in every respect.

December 18, 2014.

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IN THE
Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, Senator Tom Harkin, Senator Patty Murray, Senator Ron Wyden, Representative Henry A. Waxman, Representative Sander M. Levin, Representative George Miller, and Representative Frank Pallone, Jr., are a group of current Members of Congress who support private rights of action for equitable relief in this context.[2] The personal experiences of *amici*, as Members of Congress who have worked extensively on legislation and oversight of Federal health programs, including those authorized under Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act, provide insight into Congress's intent to preserve prospective relief to vindicate the supremacy of the Medicaid Act over contrary state legislation. *Amici* are uniquely situated to do so.

Amici support the argument of Respondents that Congress intended to preserve the private cause of action for equitable relief to vindicate the supremacy of Medicaid conditions over contrary state action. *Amici* explain that Congress relied on this Court's longstanding practice of hearing these causes of action, except where statutes expressly barred them. In

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[1] No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the clerk.

[2] Many of these Members of Congress also participated as *amici* in *Douglas v. Independent Living Center of Southern California, Inc.*, Nos. 09-958, 09-1158, and 10-283.

contrast, the approach suggested by Idaho and the Solicitor General would upend centuries of settled understanding and would undermine the effectiveness of Medicaid. *Amici* believe that such suits are critical to protect the intended beneficiaries of Medicaid—the Medicaid recipients. Allowing for prospective relief in this context supplements the agency's limited enforcement resources, and can be a more effective measure than using administrative means to cut off federal funding to the program. Because Section 30(A) is no different than any of the dozens of other Congressional enactments that this Court has allowed to be enforced through the Supremacy Clause, the judgment below should be affirmed.

SUMMARY OF ARGUMENT

Nearly 75 years ago, Justice Cardozo set forth the basic principle that when "[federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states." *Helvering v. Davis*, 301 U.S. 619, 645 (1937). This case implicates not only that venerable principle, but one of even older vintage: the right to seek equitable relief under the Supremacy Clause against state law that is inconsistent with Congressional enactments.

Having chosen to participate in Medicaid, Idaho is obligated to fund the Medicaid program that Congress enacted. Respondents, who receive Medicaid payments for providing residential habilitation services to individuals in Idaho, contend that Idaho has not complied with its funding obligations. For nearly 200 years this Court has heard claims under the Supremacy Clause seeking prospective relief based on preemption

of inconsistent state law without ever requiring an express cause of action from Congress to do so. Now, Idaho, joined by the Solicitor General, asks this Court to hold for the first time that a federal provision, Section 30(A), is not enforceable in a private suit seeking equitable relief. This Court should reject that position for four reasons.

First, Congress has relied on this Court's unbroken practice of permitting suits for equitable relief under the Supremacy Clause. Congress is fully capable of stating when it does not want an enactment to be construed as displacing state law. But when Congress does not so state, it has long understood that an action for equitable relief will be available to individuals harmed by state law that is inconsistent with federal law. Idaho's broad argument that such relief is available only when Congress has provided an express cause of action is irreconcilable with the many cases from this Court allowing such relief without ever requiring the plaintiff to identify a right of action. And it is also irreconcilable with this Court's practice of presuming that equitable relief is available under *Ex parte Young* unless Congress affirmatively indicates otherwise. *See infra* Part I.

Second, the efforts of Idaho and the Solicitor General to distinguish Section 30(A) on the ground that it imposes obligations under the Spending Clause are unavailing. This Court has routinely allowed Supremacy Clause actions to enforce obligations incurred under the Spending Clause. Indeed, this Court not long ago affirmed the availability of that very relief in a case in which the plaintiffs argued that state

regulation was preempted by Medicaid. *See PhRMA v. Walsh*, 538 U.S. 644, 662-74 (2003). Moreover, the Spending Clause context provides greater reason, not less, to allow preemption actions. Idaho and the Solicitor General assert that the proper remedy here is for the United States to cut off funding to a state that does not comply with its Medicaid obligations. But that would only dramatically exacerbate the problems of Medicaid recipients in Idaho. In contrast, allowing private attorneys general to supplement the agency's enforcement powers provides a remedy that is consistent with Congress's goals and vindicates the supremacy of federal law. Nor can Petitioners plausibly contend that affirming the result below would open the floodgates to additional suits. To the contrary, an affirmance would simply preserve the *status quo*, which the courts have had no difficulty managing. *See infra* Part II.A &B.

Third, Idaho and the Solicitor General are wrong when they contend that a preemption claim is improper here because Respondents are seeking a benefit rather than invoking an immunity. When a state receives federal funds, Congress is equally concerned that a state comply with *all* the conditions attached to those funds, whether they limit how a state may regulate, or obligate the state to provide a certain standard of benefits. *See infra* Part II.C.

Fourth, the argument that there is no right to enforce Section 30(A) under the Supremacy Clause is particularly weak because Congress has repeatedly debated whether to eliminate Section 30(A) and/or bar private rights of action, and it has consistently refused

to do so, even as it has eliminated other rights-giving provisions in Medicaid. *See infra* Part III. Congress has expressly chosen to maintain Section 30(A) knowing full well that it provides enforceable rights. This Court should not override that decision, especially when doing so would require overturning two centuries of case law.

ARGUMENT

I. CONGRESS HAS RELIED ON THIS COURT'S LONG TRADITION OF ALLOWING PRIVATE SUITS FOR EQUITABLE RELIEF UNDER THE SUPREMACY CLAUSE.

When Congress legislates, it does so with an understanding of the legal principles that will govern the interpretation of what it enacts. *Amici* can attest to the truth of that statement based on their extensive legislative experience. And it is correct as well as a matter of law under this Court's well-settled doctrines. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) ("We assume that Congress is aware of existing law when it passes legislation.") (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, (1990)). For example, when Congress uses a term drawn from the common law, this Court understands that usage indicates Congress's intent to incorporate the term's common law gloss. *E.g., Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003). Likewise, when Congress chooses *not* to amend a statute in the face of a judicial construction, it can be presumed to have acceded to the interpretation this Court articulated. *E.g., Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011).

The question in this case is whether Congress intended to allow suits under the Supremacy Clause to remedy state law inconsistent with the obligations imposed by Section 30(A) of the Medicaid Act. And for 200 years this Court's decisions have indicated that such relief is available to vindicate the supremacy of federal law in the absence of an express provision to the contrary. The line of authority establishing this proposition encompasses some of this Court's most seminal cases, both longstanding and of more recent vintage, concerning the preeminence of federal authority. *See, e.g., State v. Wilson*, 11 U.S. (7 Cranch) 164, 166 (1812) (suit initially brought in state court challenging state tax as unconstitutional under Contracts Clause); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (suit to enjoin state tax as unconstitutional under Congress's Article I power to constitute Bank of United States); *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898) (finding tax unconstitutional after considering only whether the Court had jurisdiction); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (exercising jurisdiction over private party claim that California statute was preempted by federal regulation); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (enjoining state law preempted by ERISA); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (enjoining state law restricting purchases from Burma on preemption grounds).

Congress's understanding that equitable relief is available under the Supremacy Clause has been bolstered by the consistent (until recently) position taken by the Executive Branch on this issue. The

Solicitor General contends, as it first argued in *Douglas*, that "[t]his Court has never squarely decided if or when a federal court should create or recognize a cause of action for equitable relief directly under the Supremacy Clause." SG Br. 15. But the Executive has routinely appeared in such cases in favor of federal preemption, seeking the benefit of these private suits to vindicate the supremacy of federal law. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 194805; Brief for the United States as *Amicus Curiae*, *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) (No. 91-1326), 1992 WL 12012049 (filing on behalf of private plaintiffs seeking declaratory judgment that state law is preempted by ERISA).

Indeed, even when the Solicitor General has argued that the state law was not preempted by federal law—thus arguing against the private plaintiffs' interest—prior to *Douglas*, the Executive had never suggested that the plaintiffs lacked a cause of action. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (No. 95-789), 1996 WL 340772 (arguing against federal preemption where plaintiffs sought declaratory judgment that ERISA preempted state enforcement action, but failing to raise cause of action question); Brief for the United States as *Amicus Curiae*, *Carleson v. Remillard*, 406 U.S. 598 (1971) (No. 70-250), 1971 WL 133367 (opposing private plaintiffs on Social Security Act preemption of state welfare regulation, but not addressing cause of action); Brief for the United States as *Amicus Curiae*,

Cal. Dep't of Human Res. Dev. v. Java, 402 U.S. 121 (1971) (No. 70-507), 1971 WL 147066 (same).

Congress is capable of stating when federal law is *not* intended to preempt state regulation. *See, e.g.*, 29 U.S.C. § 1144(b)(2)(A) ("[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance ."). Likewise, Congress is equally capable of expressly limiting the availability of judicial remedies, such as by providing an alternative remedial scheme. *See, e.g.*, *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 74-76 (1996); *see also* Resp't Br. 45. But when Congress imposes obligations that do not contain limiting language of that sort, it relies on this Court's venerable practice of permitting suits to enjoin state laws that are preempted by federal law.

Against this background, it is thus remarkable that one of Idaho's lead arguments is that Section 30(A)'s absence of an express right of action signifies that Congress "decided" to foreclose relief under the Supremacy Clause. Pet'r Br. 18-35. This Court has *never* required an express cause of action in its Supremacy Clause cases. To the contrary, this Court has remained steadfastly open to suits for purely prospective relief as a critical but limited safeguard, even while becoming more guarded against suits that seek monetary relief. For example, since this Court held in *Cort v. Ash*, 422 U.S. 66 (1975), that it would apply a more stringent test for implying rights of action in federal statutes, there have been no fewer than nine cases in which this Court has upheld injunctive relief

under the Supremacy Clause.[3] *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25 (1996); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983); *Ariz. Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (even where Section 1983 relief is unavailable, "plaintiffs may vindicate [their] pre-emption claims by seeking declaratory and equitable relief in federal district courts through their powers under federal jurisdictional statutes") (Kennedy, J., dissenting).

Instead, a comparison to the *Ex parte Young* doctrine is highly pertinent. *See Ex parte Young*, 209 U.S. 123 (1908). Far from requiring an express authorization to pursue injunctive relief under *Ex parte Young*, this Court *presumes* that Congress intends such relief to be available absent a clear indication by

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[3] During that period there were also at least seven such cases in which this Court found that injunctive relief was unwarranted. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *Ohio Bureau of Empl. Servs. v. Hodory*, 431 U.S. 471 (1977); *United States v. County of Fresno*, 429 U.S. 452 (1977). In not one of those cases did the Court express doubt about the existence of a cause of action in the first place.

Congress to the contrary. *E.g.*, *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002) (allowing plaintiff to pursue relief under *Ex parte Young* because statute did not "display any intent to foreclose" that relief).

Rather than addressing this anomaly directly, Idaho and the Solicitor General contend that *Ex parte Young* is not relevant here because "[s]ome have described *Ex parte Young*" as permitting a plaintiff to "anticipatorily bring a suit in equity" only in order to prevent a state from bringing its own punitive action against the *Young* plaintiff. SG Br. 18. *Accord* Pet'r Br. 42. But *Ex parte Young* is not so limited. Such suits may be brought to compel state action required by federal law, and not just to enjoin punitive action. In the highly analogous case of *Edelman v. Jordan*, for example, this Court explained that *Ex parte Young* could be used to compel state officials to comply with the federal time limits for processing and paying applicants for a federal-state aid program on a prospective basis. 415 U.S. 651, 655-56, 664-66 & n.11 (1974). The availability of injunctive relief was presumed there, even though the Court made no mention of any private right of action. The same result should hold here.

In sum, this Court has never required an express cause of action to seek preemption under the Supremacy Clause, and indeed has consistently presumed that such relief would always be available under *Ex parte Young*. This Court should not disrupt Congress's expectations by ruling that private enforcement of Section 30(A) under the Supremacy

Clause is foreclosed just because Congress did not provide an express right of action to do so.

II. Enforcement Under The Supremacy Clause Is Particularly Appropriate Where, As Here, The State's Obligations Arise Under The Spending Clause.

Idaho and the Solicitor General contend that because Section 30(A)'s obligations arise under Congress's Spending Clause authority they are inappropriate for enforcement through the Supremacy Clause. From *amici*'s perspective, that conclusion does not follow. When a state or local entity agrees to accept federal funds, it is obligated to use those funds in the manner required by Congress and to comply with any and all conditions put on the funds. As we explain, allowing such suits both comports with this Court's past practice and with common sense.

A. This Court Has Consistently Permitted Preemption Claims Seeking To Enforce Obligations Incurred Under The Spending Clause.

At the outset, it is important to recognize that notwithstanding the assertions of Idaho and the Solicitor General, this Court has never treated Spending Clause obligations differently in allowing claims to proceed under the Supremacy Clause. When Congress exercises its Spending Clause powers, inconsistent state law must give way under the Supremacy Clause, just as it must to any other enactment of Congress. *See, e.g., Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985) (holding that the Payment in Lieu of Taxes Act

preempted state rules mandating how local governments used the moneys); *Blum v. Bacon*, 457 U.S. 132, 138 (1982) (holding that federal regulations pursuant to the Emergency Assistance Program, which is federally funded under the Social Security Act, preempted state provisions regarding emergency assistance).

Indeed, this Court has heard numerous preemption challenges to state law under Medicaid itself. *See Wos v. E.M.A. ex rel Johnson*, 133 S. Ct. 1391, 1398 (2013) (holding that Medicaid's anti-lien provision preempted statute requiring one-third of damages recovered by beneficiary for tortious injury to be paid to state); *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 279-80 (2006) (holding that Medicaid preempted state laws regarding liens on settlement agreements); *PhRMA*, 538 U.S. at 662-74 (examining whether a preliminary injunction was appropriate where state action was allegedly preempted by Medicaid); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 475 (1996) (per curiam) (discussing proper scope of injunctive relief while declining to grant certiorari on the question whether the Hyde Amendment preempted contrary state laws).

B. A Remedy Under The Supremacy Clause Is Particularly Useful In Spending Clause Cases.

Despite the many cases allowing Spending Clause challenges, the Solicitor General argues that the only proper remedy is for HHS to undertake a compliance action and withhold funds from states that fail to

comply with relevant federal law.[4] SG Br. 24. Having reserved to the federal government the remedy of cutting off Medicaid funds (the argument goes), Congress must not have intended that the ultimate beneficiaries of those funds be able to sue when states take action inconsistent with federal law.

That argument turns the purpose of Medicaid on its head. Medicaid is a federal program "through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Withholding federal funding would make it even less likely that those "needy individuals" would receive the medical care that a state agreed to provide.

This Court considered a similar situation in *Rosado v. Wyman*, where it heard a lawsuit by individuals who received benefit payments from New York as part of Congress's Federal Aid To Families with Dependent Children program. 397 U.S. 397 (1970). The petitioner claimed that New York's method of distributing the benefits violated the terms on which the federal government provided the funds to New York. *Id.* at 399. In holding that the petitioner had a right to proceed (and prevail), Justice Harlan wrote for the Court:

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4 For its part, Idaho goes further still, arguing that a state's "depart[ure] from the Medicaid Act's reimbursement criteria" does not even constitute a failure to comply with federal law and that HHS's ability to "turn off the spigot or merely reduce the amount of federal funding" is simply a way to entreat states into complying. Pet'r Br. 52.

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. *We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.*

Id. at 420 (emphasis added).

So too here. It also bears emphasizing that *Rosado* was decided by the Court more than 40 years ago and the courts have not been inundated with claims. Thus contrary to the concerns that some Justices expressed in *Douglas* about opening the floodgates to private actions, *see, e.g.*, Transcript of Oral Argument at 47-49, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012) (No. 09-958), a ruling affirming the judgment below here would simply preserve the *status quo*.

Moreover, far from being unnecessary in Spending Clause cases, allowing for private enforcement in this context is particularly useful to Congress. As the Solicitor General recognized in opposing certiorari in *Douglas*, "[a] system that relies solely on agency review may often be less effective in ensuring the supremacy of federal law than a system of agency review supplemented by private enforcement." Brief

for the United States as *Amicus Curiae* at 19, *Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., Inc.*, No. 09-958 (brief filed Dec. 3, 2010), 2010 WL 4959708, *cert. granted*, 131 S. Ct. 992 (U.S. Jan. 18, 2011). Allowing for private enforcement provides a middle ground between doing nothing and cutting off funding. *See id.* (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 705 (1979)). It assists executive agencies that may lack the resources to enforce in every individual case the obligations Congress imposes. It offers an alternate avenue of relief to the months and even years of delay between when a state implements cuts and when the agency completes its review. It provides some assurance that Congress's objectives will be realized even during administrations that may have different enforcement priorities. And in this case in particular, it provides impoverished, developmentally disabled Medicaid patients and the medical providers who serve them a means of redress in the court system that they would often not have in the political battles over budget priorities.

Put another way, there is no reason to think that Congress would have limited enforcement of Medicaid obligations to a remedy that would terminate those obligations. Idaho accepts more than $1 billion in federal Medicaid funds per year in exchange for its promise, among other things, to ensure that needy patients have access to health care. Congress authorized the expenditure of those funds because it found that they would serve important public interests. To the extent that Idaho has failed to adhere to its obligations, such failure is a reason to compel it to do so,

not a reason to abandon those interests by cutting off the program.

C. Congress Intends The Ultimate Beneficiaries Of Spending Clause Funds To Be Able To Obtain Equitable Relief When A State Fails To Comply With Its Obligations.

Idaho and the Solicitor General also offer a cluster of arguments based on the fact that Respondents are not directly regulated by Section 30(A), and instead receive their benefits from the state. Pet'rs' Br. 42-46; SG Br. 31-33. These arguments are offered in an apparent attempt to distinguish this case from the many others allowing relief under the Supremacy Clause, but they have no bearing on what Congress should be presumed to have intended.

The Solicitor General, for example, emphasizes that Section 30(A) does not regulate respondents' "primary conduct," and that respondents are seeking a benefit promised by federal law rather than an "immunity" from state regulation. SG Br. 31. Idaho similarly contends that a preemption claim may proceed only where a plaintiff seeks to mount a defense based on "immunit[y] from state regulation." Pet'rs' Br. 42.

But legislation, including Spending Clause legislation, may bestow benefits or provide immunities, and in both cases Congress intends that those provisions be followed.[5] Contrary to Idaho's argument,

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[5] For example, neither Idaho nor the Solicitor General explains how this distinction works in light of this Court's decision in *Crosby*. The state's action in that case could be characterized as either a deprivation of a benefit (*i.e.*, eligibility for a state contract)

a state is no more free to withhold a benefit it agreed to bestow as a condition of taking a grant of federal funds than it is to violate the restrictive conditions attached to those funds. *See* Pet'rs' Br. 50-52.

This Court's decision in *PhRMA v. Walsh* is instructive. In *PhRMA*, a drug company trade association sought injunctive relief against a state that had imposed certain requirements on drug companies. The trade association argued that the state's program was inconsistent with the obligations the state undertook as a condition of receiving Medicaid funds, and the program was therefore preempted by federal law. The Solicitor General filed an amicus brief in favor of preemption, and only two members of the Court expressed any doubt that a private cause of action was permissible in that context.

Idaho fails to grapple with *PhRMA*, deeming it irrelevant on the basis that "the question whether the plaintiff could maintain a cause of action directly under the Supremacy Clause" was not directly addressed. Pet'r Br. 45. The Solicitor General acknowledges that *PhRMA* "could arguably be described as similar" to this case, but contends that it is distinguishable because "the question was not whether the State had complied with obligations imposed as a condition of receiving federal Medicaid funds, but rather, whether the State's

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or the imposition of a burden (*i.e.*, increasing direct and indirect costs on companies doing business in Burma). *Compare* 530 U.S. at 366, *with id.* at 379. *Crosby* therefore shows how easy it is to collapse the purported distinction between denying benefits and imposing burdens and demonstrates that the distinction cannot separate permissible Supremacy Clause claims from impermissible ones.

invocation of its Medicaid authority to impose independent regulatory requirements on drug manufacturers was consistent with the Medicaid Act." SG Br. 32 n.12. But again, there is no reason to think that Congress would be more inclined to allow a state to fail to comply with "obligations imposed on it as a condition of receiving federal funds" than it would to allow a state to impose restrictions inconsistent with those obligations.

Idaho and the Solicitor General also advert to contract analogies and contend that because the states are the direct recipients of the federal funds, the respondents in this case are reduced to third-party beneficiaries who have no right to sue to enforce compliance with the "contract." Pet'r Br. 26-27; SG Br. 22-23. *But see* SG Br. 22 (conceding that this "Court has also recognized that neither the federal statute itself nor the resulting arrangement with a fund recipient constitutes an ordinary contract").

Amici respectfully disagree with this characterization. To be sure, the states are critical partners in providing care under Medicaid. But they are not the intended beneficiaries of Medicaid. Medicaid's purpose is to ensure that poor and developmentally disabled people have access to basic medical care by guaranteeing payment to medical providers who serve these vulnerable populations. And when a state fails to live up to its responsibilities to these beneficiaries, Congress intended to preserve the private cause of action for injunctive relief under the Supremacy Clause as a limited but critical safeguard for these beneficiaries.

This Court's decision in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), supports a cause of action along precisely these lines, contrary to Idaho's and the Solicitor General's reading of the case. Pet'r Br. 31-33; SG Br. 22. As Justice White's dissent in that case made clear, the only distinctive aspect of private suits under Spending Clause statutes seeking to vindicate the Supremacy Clause is the *scope* of the appropriate injunctive relief. 451 U.S. at 53-54 (White, J., dissenting). Justice White explained that such injunctions "cannot survive the State's decision to terminate its participation in the program." *Id.* This Court's holding in that case is entirely consistent with that distinction: although the Court determined that the federal statute at issue did not create substantive rights to monetary relief or "'appropriate' treatment in the 'least restrictive' environment," *id.* at 11, 29, this Court left open the possibility of injunctive relief. The majority explained that it would not "significantly differ" from (dissenting) Justice White's proposed remedy if the district court were to find on remand that the state had failed to comply with "federally imposed conditions." *Id.* at 30 n.23. *Pennhurst* thus makes clear that the scope of the remedy must match the contours of the preemption in these cases, which stretches only as far as the state's acceptance of federal funding. It comes into play after a determination on the merits; it certainly does not serve as a threshold bar to suit.[6]

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[6] To the extent the majority opinion can be read to limit the remedy to offering the State a choice between assuming the additional cost of compliance or not using federal funds, *see id.* at 29, that is a question as to the scope of the remedy, not the right to seek relief in the first place. In any case, the majority's position is

Nor are Idaho and the Solicitor General correct to argue that the "broad and general" nature of the obligations imposed by Section 30(A) makes them inappropriate for an action seeking preemption. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012). In the first place, this critique goes not to *whether* a cause of action exists in the first place, but to the *scope* of judicial relief available. This Court expressly limited the question presented in this case only to the first issue, and thus the second is not presented here.

Moreover, as the Solicitor General concedes, Section 30(A)'s standards *are* enforceable in a judicial action where a State disagrees with the Secretary's disapproval of a State plan or amendment. *See* SG Br. 24. If they are discernable in that context, it is difficult to see how they are unenforceable in the context of a private suit. Any remaining concerns about the need for agency input should be allayed by HHS's ongoing rulemaking proceeding, which will result in a final rule providing guidance to the States in complying with Section 30(A). *See* SG Br. 10 n.4. As always, the agency's own interpretation will trump an inconsistent interpretation by a private party. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005).

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entirely consistent with the dissent's explanation that courts can only prospectively compel states to abide by federal conditions so long as the state continues to accept funding. *See id.* at 53-54 (White, J., dissenting).

III. The History Of Section 30(A) Demonstrates With Particular Clarity That Congress Did Not Intend To Foreclose Actions Under The Supremacy Clause.

Because the history of Section 30(A) demonstrates that Congress consciously chose not to limit its means of enforcement, it would be particularly odd for the Court to rule that no private right of action is available to enforce that statute.

Section 30(A) in its current form dates back to 1989, and in the last 15 years it has been the subject of repeated, but unsuccessful, efforts in Congress to restrict private rights of action. These efforts stemmed from an earlier decision by this Court, *Wilder*, 496 U.S. at 509-10, which held that language similar to Section 30(A), known as the "Boren Amendment" was enforceable under Section 1983.[7]

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[7] The Boren Amendment provided that:

> a State plan for medical assistance must . . . provide . . . for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates (determined in accordance with methods and standard developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have

Congress responded to this holding by considering whether to bar *all* private actions to enforce a state's payment rates under Medicaid, including those under Section 30(A). For example, in 1995, the President vetoed Congress's attempt to prohibit any "cause of action" to enforce a state's payment rates under Medicaid, H.R. 2491, 104th Cong. § 7002(b)(4) (1995).[8] Congress did not attempt to override this veto. *See* Jennifer Suttle, Cong. Research Serv., CRS Report for Congress: Balanced Budget Act of 1995: A Legislative History and Brief Summary of H.R. 2491 CRS-8 (1996). In 1996, the Senate initially attempted to bar private suits again, but Congress ultimately enacted a statute without any such provision. *Compare* S. 1956, 104th Cong. § 1508 (1996), *with* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

As the Solicitor General points out, Congress ultimately repealed the Boren Amendment in 1997. *See* Pub. L. No. 105-33, § 4711(a), 111 Stat. 251. But Congress did *not* repeal Section 30(A), nor did it add language restricting causes of action. This was no oversight. At the same hearing in which Congress heard criticism of the Boren Amendment, some witnesses also criticized litigation under Section 30(A),

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reasonable access to inpatient hospital services of adequate quality.

Wilder, 496 U.S. at 502-03 (emphasis added) (ellipses in original) (quoting 42 U.S.C. § 1396a(a)(13)(A) (1990)).

[8] President Clinton vetoed H.R. 2491 on December 6, 1995. Ann Devroy & Eric Pianin, *Clinton Vetoes GOP's 7-year Balanced Budget Plan*, WASH. POST, Dec. 7, 1995, at A1.

which they deemed a "Boren-like" provision. *See Medicaid Reform: The Governors' View, Hearing of the H. Comm. on Commerce, Subcomm. on Health and Env't*, 105th Cong. 21 (1997) (prepared statement of Govs. Bob Miller and Michael O. Leavitt); *Governors' Perspective on Medicaid, Hearing Before the S. Comm. on Fin.*, 105th Cong. 37 (1997) (prepared statement of Govs. Bob Miller and Michael O. Leavitt). That Congress left Section 30(A) undisturbed underscores the conclusion that private enforcement under the Supremacy Clause remains viable under that provision.

***

Congress remains free to amend the Medicaid statute to shape or limit relief as Congress has done in other contexts when necessary. But there is nothing about Section 30(A) that makes it different from any of the other federal enactments that this Court has permitted to be enforced under the Supremacy Clause. Idaho agreed to provide a certain standard of benefits as a condition of receiving federal funds, and consistent with this Court's precedents, it is subject to equitable action if it fails to comply with those conditions.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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RICHARD ARMSTRONG and LISA HETTINGER,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC.; INCLUSION, INC.; TOMORROW'S HOPE SATELLITE SERVICES, INC.; WDB, INC.; and LIVING INDEPENDENTLY FOR EVERYONE, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NATIONAL GOVERNORS ASSOCIATION AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Supremacy Clause supplies a cause of action to sue in federal court even where the underlying federal law creates neither a federal right nor a defense.

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INTEREST OF *AMICI CURIAE*[1]

Amici — the National Governors Association and the Council of State Governments — are national organizations whose members include State elected and appointed officials from across the United States. These organizations regularly file *amicus* briefs in cases that, like this one, concern federalism and raise pre-emption challenges.

In this case, the Court will decide whether the Ninth Circuit misconstrued the Supremacy Clause when it held that private parties without federal rights or defenses may seek legal and equitable relief to enforce their own notions of what federal statutes require of States. The effect is to shift resolution of alleged conflicts between state policies and federal law, which often are of a discretionary and policy-focused nature, from administrative bodies to the courts, without congressional authorization. That is a recipe for increased federal-state conflict and for frustration of state attempts to achieve joint state-federal goals in new and creative ways.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* or their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the dissenters explained in *Douglas v. Independent Living Center of Southern California, Inc.* — a case which raised, but did not resolve, the same question presented here — "[t]he purpose of the Supremacy Clause is ... to ensure that, in a conflict with state law, whatever Congress says goes." 132 S. Ct. 1204, 1212 (2012) (Roberts, C.J., dissenting). The majority opinion in *Independent Living Center* did not dispute that interpretation, *see id.* at 1211 ("[W]e do not address whether the Ninth Circuit properly recognized a Supremacy Clause action to enforce this federal statute[.]"), and it comports with the Clause's origins in colonial law; its drafting history at the Philadelphia Convention; early scholarly interpretations; and this Court's jurisprudence on implied and statutory causes of action. Far from granting plaintiffs a roving commission to seek judicial correction of perceived conflicts between State and federal law, the Supremacy Clause is a priority rule that ensures the precedence of federal law in litigation where federal law creates an individual *right* or *defense*.

In litigation between private parties and State officials or agencies, preemption claims arise in three procedural contexts: (1) where Congress has expressly or impliedly created a private cause of action allowing aggrieved persons to sue State officials for violations of federal rules; (2) where federal law provides a defense to criminal or civil actions brought against a person by a State; and (3) where equity permits a person with a federal defense to file an anticipatory suit to enjoin a criminal or

civil proceeding that would violate federal law. There is no basis for the Ninth Circuit's holding that a person may sue in court to enforce the preemptive effect of federal law where Congress has not created a private right of action.

That leaves Respondents in this case without any route into federal court. It is undisputed that Respondents have no right of action arising directly from Medicaid, Section 1983, any other federal statute, or any provision of the Constitution other than the Supremacy Clause standing alone. It is also undisputed that Respondents are not subject to any State enforcement proceeding to which federal law might serve as a defense, a prerequisite for actions under the equitable theories reflected in, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908). In holding that the Supremacy Clause permits plaintiffs to bring suit in federal court for pre-emption of State law in any case where they have standing, the Ninth Circuit erred and should be reversed.

Because of the novelty of the Ninth Circuit's construction of the Supremacy Clause, we will first address the historical background and purpose of that Clause, and then show that the Ninth Circuit's holding is deeply inconsistent with the structural principles that long have governed federal court authority to review the acts of state governments.

ARGUMENT

I. THE HISTORY OF THE SUPREMACY CLAUSE SHOWS THAT IT DOES NOT GRANT RESPONDENTS A CAUSE OF ACTION WHERE FEDERAL LAW DOES NOT CREATE A RIGHT.

The Supremacy Clause is a solution to the inherent potential conflict in a two-tiered federal system in which the several States and the national government have overlapping authority to legislate in certain areas. As debates in the Philadelphia Convention reveal, the Supremacy Clause was crafted as an alternative to James Madison's favored solution of a congressional "negative" on State laws, and was based on the Americans' prior experience of a kind of federalism within the British imperial system. *See* Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* 11 (2004). Nothing in the Clause's colonial or Framing-era origins suggests that it would ever have been expected to create a free-standing cause of action in the absence of a federal right or defense.

A. The Supremacy Clause's Antecedents In The Colonial Charters Did Not Recognize Causes Of Action Where English Or Colonial Law Did Not Create A Right.

The concerns reflected in the Supremacy Clause were not new at the time of the Constitutional Convention. Long before the American colonies declared their independence, the question of how to ensure consistency between a supreme central authority and peripheral legislatures was a concern of British imperial administrators. Their answers to

that question are reflected in the colonial charters granted in the seventeenth and early eighteenth centuries, which allowed the colonial legislatures substantial powers of local self-government within boundaries set by British law.

The British imperial system — dubbed by historians the "transatlantic constitution" — employed two basic procedural mechanisms for ensuring that colonial law did not offend British law. Some, but not all, colonies were required to send copies of enacted statutes to London for review by the Lords of the Committee for Trade and Plantations (commonly called the "Board of Trade"), which had the power to annul colonial laws deemed repugnant to British law. *Id.* at 54-57. This was the model for Madison's "negative." In addition, parties in ordinary litigation in colonial courts could appeal to London — to the Privy Council's Committee for Hearing Appeals from the Plantations, which acted in an essentially judicial capacity — in cases of claimed repugnancy between colonial and British law. *Id.* at 73-90, 125-26. This became the model for the Supremacy Clause.

1. The Colonies were required to legislate consistently with English law.

Although the colonial charters permitted substantial local self-government, they required adherence to fundamental British law and forbade the enactment and enforcement of laws "repugnant" to British law. The Second Charter of Virginia, for example, adopted in 1609, granted the colonial Council "full and absolute Power and Authority to govern according to such Orders, Ordinances,

Constitutions, Directions, and Instructions, as by our said Council as aforesaid, shall be established[.]" *See* Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* 3801 (1909) ("*Federal & State Constitutions*").[2] That authority, however, came with a proviso: It would hold on condition that "the said Statutes, Ordinances and Proceedings as near as conveniently may be, be *agreeable* to the Laws, Statutes, Government, and Policy of this our Realm of England." *Id.* (emphasis added).[3]

Later colonial charters added a degree of clarity to the requirement that colonial law be "agreeable" to that of England. In most charters, that requirement evolved into the rule that colonial governments could not contradict English law. The Third Charter of Virginia, for example, required that Virginia's laws "*be not contrary to* the Laws and Statutes of this our Realm of England[.]" *Id.* at 3806 (emphasis added). The 1629 Massachusetts Bay Charter granted power to legislate so long as the laws "be not contrarie or

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[2] This charter, and the other colonial charters cited herein, is also available online through the Avalon Project at the Yale law library. *See* http://avalon.law.yale.edu/subject_menus/statech.asp.

[3] "Agreeable," as defined by Samuel Johnson, meant "[s]uitable to; consistent with; conformable to." I Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (unpaginated) ("Johnson").

repugnant" to English law. *See id.* at 1853.[4] The 1662 Connecticut charter granted authority to enact legislation "not Contrary to" English law, *id.* at 533; likewise the 1732 Georgia Charter required that colonial laws "be reasonable and not contrary or repugnant to the laws or statutes" of England, *id.* at 770.[5] *See also, e.g.*, *id.* at 3215 (1663 Rhode Island Charter ("not contrary and repugnant unto, butt, as neare as may bee, agreeable to the lawes of this our realme of England, considering the nature and constitutions of the place and people there")); *id.* at 2765 (1665 Carolina Charter ("reasonable, and not repugnant or contrary, but as near as may be, agreeable to the laws and statutes of this our kingdom of England")). These provisos foreshadowed our modern idea of conflict pre-emption.

In contrast to the later Supremacy Clause, British imperial law did not treat all Acts of Parliament as superior to colonial law. In general, it was thought that the "plantations" were subject to some or all of the common law that had been in effect at the time of settlement. Subsequent Acts of Parliament applied to the "plantations" only if they

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[4] An informative discussion of the development of Massachusetts and other New England colonial charters can be found in David A. Weir, *Early New England: A Covenanted Society* (2005).

[5] Johnson defined "contrary" as "[o]pposite; contradictory; not simply different, or not alike, but repugnant, so that one destroys or obstructs the other," or as "[i]nconsistent; disagreeing." I Johnson. "Repugnant" meant "[c]ontrary; opposite; inconsistent." II Johnson.

were expressly mentioned or if the colonies voluntarily adopted them. *See* Bilder, *The Transatlantic Constitution* at 37-39.

2. Enforcement of consistency with English law did not include causes of action for colonists who did not have legal rights.

Enforcement of consistency between colonial and English law was the responsibility of the English Privy Council. The Privy Council had both administrative and legal means at its disposal for that task. *See* Phillip Hamburger, *Law and Judicial Duty* 261 (2008) ("The Privy Council served as a judicial court to hear appeals from colonial courts, but it also oversaw the Empire[.]").

The principal administrative method of enforcing consistency with English law was direct review of colonial statutes, followed by approval or disallowance. Originally applied only to Royal colonies, by 1700 most colonial charters had adopted the requirement that the colonial assemblies send their laws to England for such review. *See* Bilder, *The Transatlantic Constitution* at 54-56. [6]

Review of colonial statutes from 1696 through Independence was conducted by the Lords of Trade

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[6] Rhode Island lacked such a provision. The ultimate English authority over Rhode Island, in fact, was the threat that its charter would be revoked. To avert that outcome, the colonial legislature put considerable effort into ensuring that its laws would be consistent with those in England (and convincing English authorities of that consistency). Bilder, *The Transatlantic Constitution* at 57-69.

and Plantations, usually called the Board of Trade, which advised the Privy Council on statutes sent for review. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* 44 (1915). The Board of Trade would sometimes focus on colonial statutes brought to its attention by petitions from parties who claimed to be injured by them, *id.* at 50, 59, 75-76, and it gradually adopted quasi-judicial (though "informal") procedures for its hearings, *id.* at 51-52. But the Board of Trade was not a court; its proceedings were not strictly judicial in nature; and its proceedings were not triggered by anything like a legal complaint and cause of action. Rather, the Board's authority was essentially political and administrative. Hamburger, *Law and Judicial Duty* at 261 (referring to the disallowment of colonial legislation as an "executive" function).

Significantly (and similar to Madison's later proposal for a "negative" at the Convention), the Board was charged not only with the job of determining whether colonial statutes were consistent with English law, but "'the Usefulness or mischief thereof to our Crown,'" *see* Russell, *Review of American Colonial Legislation* at 48, *i.e.*, "with a view to [a statute's] probable expediency for the colony and the Empire, possible injury to other colonies, and unseemly infringements upon rights to private property or individual liberty." *Id.* at 109, 203 (similar). That was necessarily a matter not just of law, but of policy. *See, e.g., id.* at 118 (discussing the Board's role in preventing the colonies from competing with English industries); 120-21 (Board's role in regulating colonial paper currency); 143-47 (discussing disallowance of laws that were "unnecessary and trivial," "absurd and

unreasonable," "retrospective," enacted "irregular[ly]" or in "haste," or that treated "forbidden subjects").

This administrative review of colonial statutes was, of course, subject to real and perceived abuse. Strikingly, no fewer than four of the grievances against the King listed by Thomas Jefferson in the Declaration of Independence (including his first two) appear to have concerned the Privy Council's denial of assent to colonial laws:

> He has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. ... He has endeavored to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners .... He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

See Decl. of Independence (U.S. 1776).

A second, less comprehensive method of reviewing colonial statutes appeared in charters that provided for a judicial process to ensure conformity of

colonial to British law.[7] This took the form of a right for litigants in colonial cases to appeal adverse court judgments to the Privy Council, which would protect the rights or defenses that English law conferred. The 1622 Gorges Charter, for example, provided that when the Maine colonial government was in "default" of its obligation to conform to English law, "it shall be lawful for any of the aggrieved inhabitants and planters to appeal" to the Council of New England, based in Devonshire. *Federal & State Constitutions* at 1624. King Charles II's 1676 Grant of New England to the Duke of York was even more explicit. That charter, just after familiar language requiring that colonial laws "be not contrary to, but as near as conveniently may be, agreeable" to English law, added a provision "saving and reserving to us the receiving, hearing, and determining of the appeal and appeals of all or any person or persons of, in or belonging to the territories or islands aforesaid, in or touching any judgment or sentence to be there made or given." *Id.* at 2591-92. The 1681 Pennsylvania Charter was similar: It required that colonial laws "bee consonant to reason, and bee not repugnant or contrarie, but as neare as conveniently may bee agreeable to the Lawes and

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[7] Some sources indicate that the right to appeal to the Privy Council was considered an inherent right of the King's subjects, even without express mention in the charter, Arthur M. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. 279, 288 (1913), but some colonies contested the right of appeal, contending that it, along with other elements of royal prerogative, had been vested in colonial authorities by the charter. *Id.* at 293-97; *Bilder, The Transatlantic Constitution* at 73-90.

Statutes, and rights of this Our Kingdome of England," and then reserved to the Crown "the receiving, heareing, and determining of the appeale and appeales of all or any Person or Persons, of, in, or belonging to the Territories aforesaid, or touching any Judgement to bee there made or given." *Id.* at 3038. And in Rhode Island, where the charter did not contemplate review of statutes, appeals to the Privy Council from decisions of colonial courts "became the sole method to debate repugnancies to and divergences from the laws of England." *Bilder, The Transatlantic Constitution* at 73. After the colonies achieved independence, this method of judicial review for "repugnancy" formed the conceptual basis for judicial review of State statutes against State constitutions by State courts. *Id.* at 186-88.

In contrast to direct review of colonial statutes by the Board of Trade, appeals were conducted by the Privy Council's Committee for Appeals, which had a judicial character. Hamburger, *Law and Judicial Duty* at 261 (referring to the hearing of appeals from colonial courts as an exercise of the Privy Council's "judicial capacity"); *see also* Bilder, *The Transatlantic Constitution* at 74 (discussing the formalization of appellate practice in the 1690s). If the colonial court granted leave, review in the Committee was by appeal; if not, review was by petition. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 437. Litigation before the Committee was conducted by members of the bar, based on the formal record on appeal, subject to ordinary legal rules (including requirements for amount in controversy and appeal bonds), and resulted in a legally binding judgment of either

affirmance or reversal followed by a remand to the colonial court. *See* Bilder, *The Transatlantic Constitution* at 122-28; Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 284-85, 437-38.

Appeals were not conceived as arising under the transatlantic constitution's "repugnancy" principle, for mere repugnancy of colonial to English law did not supply the underlying cause of action. Rather, the appeals arose in ordinary cases, which were based on ordinary causes of action implicating personal rights at admiralty, common law, or equity. "Repugnancy" served instead as an argument on the merits. *See id.* at 85-86. In other cases, English law was invoked as a defense to application of "repugnant" colonial law. *See* Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* 561 (1950).

For example, historian Arthur Schlesinger Sr. identified three Privy Council appeals of the greatest legal significance for the validity of colonial statutes: *Winthrop v. Lechmere*, *Phillips v. Savage*, and *Clark v. Tousey*. Each implicated the validity of colonial statutes, and each arose from a dispute between an heir who stood to gain from the colonial intestacy statutes and an heir who stood to receive more under the English common law rule. Schlesinger, *Colonial Appeals to the Privy Council*, 28 Poli. Sci. Q. at 440-45.

In Rhode Island, the first successful private-party appeal from Rhode Island to the Privy Council involved a land dispute that ultimately turned on whether a colonial law constituting the colonial Assembly as a court of equity was repugnant to

British law, which confined equity to the prerogative courts of the Crown. Bilder, *The Transatlantic Constitution* at 80-82. This resolved an important and contested question of the respective authority of colonial and royal courts, *id.* at 79, but it arose in an ordinary case about ownership of land.

Another illustrative example from Rhode Island was the litigation brought by James MacSparran, a clergyman of the Church of England, to clear title to lands set aside for support of an "orthodox" minister. The colonial court concluded that this meant, in context, the Congregationalist claimant. MacSparran appealed to the Privy Council on the ground that only a minister of the Church of England could be deemed "orthodox" under English law. The Privy Council's decision against MacSparran was an important decision restricting the reach of the established church in the colonies. *Id.* at 159-167. But despite its broad significance, the cause of action was MacSparran's mundane allegation of trespass against the lessee of a rival claimant. *Id.* at 160. In the absence of an established common law cause of action, there could have been no case, and there could have been no appeal. Neither the importance of the question nor the allegation of "repugnance" in the abstract would have sufficed.

Yet another such case arose in New York, where Colonel Nicholas Bayard was convicted of treason in colonial court under colonial law. On his appeal to the Privy Council, the Committee on Appeals "recommended [to the Privy Council] that the governor be instructed to secure the repeal of the clause under which [Col. Bayard] had been convicted

and that the sentence be reversed." Russell, *Review of American Colonial Legislation* at 104.

Some charters, in short, subjected colonial laws to an English veto. Although colonists could (and did) petition English authorities for the invalidation of colonial statutes, such petitions were fundamentally political and administrative in nature, rather than judicial in the modern sense. Other charters took a judicial approach, permitting appeals to English tribunals of colonial judgments and sentences in the course of ordinary litigation. It therefore appears that although the colonies were prohibited to enact legislation conflicting with English law, that prohibition did not alter the principle that litigants can go to court for judicial relief only if they satisfy the ordinary requirements of a cause of action in law or equity.

B. The Framers Did Not Intend The Supremacy Clause To Create A Cause Of Action Where There Is No Federal Right To Enforce.

The questions of federal administration that appeared during the colonial period surfaced once again in designing a federal union. The Framers, in their effort to resolve the problems that plagued the United States under the Articles of Confederation, had to decide how to ensure that the States would exercise their sovereignty consistently with the Union and the federal Constitution. Both forms of imperial review described above — direct review and judicial appeal — were urged at the Convention, with explicit reference to prior British imperial practice. The Supremacy Clause's history at the Convention indicates that it was adopted as the less

intrusive remedy from the point of view of the States. Early explications of the Supremacy Clause confirm that view.

1. **The records of the Constitutional Convention do not indicate that a free-standing cause of action based on the Supremacy Clause was contemplated where federal law does not create a right.**

The Framers agreed that the Union would require some sort of federal check on State legislation inconsistent with the Constitution. The debate centered on whether that check would be best exercised by Congress or by courts when the issue arose in ordinary litigation.

The Virginia Plan vested the National Legislature with power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union," I *The Records of the Federal Convention of 1787* 21 (Max Farrand ed., rev'd ed. 1966) ("Farrand"), and for the first half of the Constitutional Convention it was assumed that the supremacy of federal law would be enforced by Congress. Such review may ultimately have been political as well as legal, for Charles Pinckney and James Madison sought to expand the negative to allow invalidation of any State law the Congress "shd. judge to be improper," thus permitting Congress to invalidate State laws on the basis of policy as well as unconstitutionality. *Id.* at 164.

Other delegates — consistent with Jefferson's impression of Privy Council review more than a

decade earlier — were skeptical or even hostile to the negative. Luther Martin called the negative "improper & inadmissible," on the ground that State laws should not have to be "sent up to the Genl. Legislature before they shall be permitted to operate[.]" II Farrand at 27. Even nationalist Gouvernour Morris declared that the negative would "likely [] be terrible to the States." II Farrand at 27. Future Chief Justice John Rutledge declared that the presence of the negative "would damn and ought to damn the Constitution." II Farrand at 391. It would bind the States "hand and foot" and make "mere corporations of them." *Id.*

Support it or oppose it, both sides drew analogies to review of colonial statutes by the Board of Trade. On July 17, 1787, Madison called the "power of negativing the improper laws of the States" the "most mild & certain means of preserving the harmony of the system," reminding his listeners of the "utility" of the device in the prior "British System." II Farrand at 28. *See also* I Farrand at 164 (C. Pinckney) ("under the British Govt. the negative of the Crown had been found beneficial, and the States are more one nation now, than the Colonies were then."); *id.* at 168 (Madison) ("This was the practice in Royal Colonies before the Revolution"); *id.* at 337 (Lansing) (the proposed "Negative would be more injurious than that of Great Britain heretofore was"); II Farrand at 28 (Madison) (the "utility" of the negative "is sufficiently displayed in the British System").

Most significantly, Morris and Roger Sherman argued that a negative was unnecessary because courts would not treat a State law as valid if it came

into conflict with the Constitution. *Id.* at 27, 28. Morris explained that any law that "ought to be negatived" would be "set aside" in court anyway or else "repealed by a Nationl. law." *Id.* at 28. Sherman added that the argument for the negative rested on the false premise that State laws inconsistent with the Constitution would be valid otherwise. *Id.* at 28. In light of the familiarity to the Framers of the practice of appeals under the prior British transatlantic system, this was not a surprising reaction. Madison did not disagree, but worried that State courts could not be relied on to disregard invalid legislation as his opponents supposed. *Id.* at 27. Notwithstanding Madison's concerns, the Convention voted down the negative by seven States to three. *Id.* at 28.

Immediately upon rejection of Madison's negative, on July 17, 1787, Luther Martin moved the addition of a provision that, with later changes, became the Supremacy Clause. That proposal passed unanimously and without recorded discussion. *Id.* at 28-29. Martin wrote that he proposed the Supremacy Clause "in substitution of" the negative. III Farrand at 286.[8] The

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[8] Martin's July 17 motion borrowed the language of ¶6 of the New Jersey Plan. *See* I Farrand at 245 ("Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them . . shall be the supreme law of the respective States so far forth as those Acts . shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding[.]"). After subsequent changes, described

unmistakeable inference is that the Convention resolved the debate over how to enforce the supremacy of federal law by reliance on the judicial duty to apply federal law in cases of conflict rather than by post-enactment inspection and political review.

It is important to note that the Convention did not invest courts with a special power to enforce federal supremacy, but evidently contemplated that conflicts would arise, as they had under the prior British system, in the ordinary course of litigation. The courts' power was not conceived as the enforcement of federal mandates (although some federal statutes surely could be coercively enforced), but simply the decision as to which laws, State or federal, would prevail, and which would be void.

In its original form, as adopted on July 17, the Supremacy Clause relied on "the Judiciaries of the several States" to enforce the supremacy of federal law, presumably with appeal to the Supreme Court. II Farrand at 29. At this point, there had been no provision for creation of the lower federal courts. The July 17 version thus closely resembled the prior system of Privy Council appeals, with State courts playing the role of colonial courts, and the United States Supreme Court playing the role of the Privy Council.

The Clause underwent significant substantive revision, first by the Committee on Detail and later

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below, Martin declared the final version "worse than useless." III Farrand at 287.

by the Committee on Style. According to Edmund Randolph's notes from meetings of the Committee on Detail, the Committee considered a version of the Clause stating that "All laws of a particular state, repugnant hereto, shall be void." II Farrand at 144. The draft further provided that the "decision thereon" would be "vested in the supreme judiciary." *Id.* The language of "repugnancy" harkened back to prerevolutionary colonial charters, and the term "void" indicated the essentially negative nature of contemplated relief. The Committee, however, rejected this draft in favor of language similar to the July 17 version, but vesting decisions in "the judges in the several States," rather than "the Judiciaries of the several States," a change that entailed enforcement of the supremacy of federal law by inferior federal courts as well as by State courts. *Id.* at 183.[9] This presumably mitigated Madison's concern about reliance on State courts. A change on the floor on August 23, 1787 expanded the scope of federal supremacy beyond "Acts of the Legislature of the United States" to include *all* federal law, including the Constitution itself. *Id.* at 381-82. Lastly, the Committee on Style broadened its language to include future treaties and completed it with the "supreme law of the land" language we are familiar with today. *Id.* at 603.

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[9] By changing the language from "Judiciaries" to "judges," the Committee on Detail also made clear that judges, not juries, would decide questions of pre-emption and constitutionality. *See* Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 255 (1985).

In the final days of the Convention, Charles Pinckney sought to revive the congressional negative, this time with the proviso that it could be exercised only by a two-thirds vote of both houses of Congress. *Id.* at 390. Some delegates supported it. James Wilson, for example, thought that "[t]he firmness of Judges is not, of itself, sufficient" to ensure federal supremacy. *Id.* at 391. Sherman and Hugh Williamson, though, "thought it unnecessary" in light of federal legal supremacy. *Id.* at 390-91. After a short debate, this version of the negative failed as well. *Id.* at 391.

Wilson's indirect reference to the Supremacy Clause virtually sums up the Convention's debate. That courts would have a duty to "set aside" State laws inconsistent with the Constitution does not appear to have been in doubt. As shown by these debates, the Convention rejected the negative at least in part on the belief that courts would have a duty to accomplish the same end, and in a less intrusive manner.

2. Early interpretations do not indicate that the Supremacy Clause was regarded as creating a free-standing cause of action where there is no federal right to be enforced.

Two essays of *The Federalist*, numbers 33 (Alexander Hamilton) and 44 (James Madison), analyze of the meaning of the Supremacy Clause. *The Federalist* (Clinton Rossiter ed., 1961). Neither Hamilton nor Madison specifically addressed any charge that the Supremacy Clause by itself could be used as a basis to hale States into court on an abstract pre-emption theory where there is no

affirmative federal right— though that argument surely would have been made by Anti-federalists if they had considered it possible. Instead, wrote Hamilton: "If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed." *Id.* No. 33, at 204. Otherwise, the larger political association would "be a mere treaty and not a government, which is only another word for political power and supremacy." *Id.* (emphasis omitted). For that reason, the Supremacy Clause "*only declares a truth which flows immediately and necessarily from the institution of a federal government.*" *Id.* at 205 (emphasis added).

Madison took a similar view. Because many of the existing State constitutions reserved to themselves the powers not granted to the United States under the Articles of Confederation (or, indeed, "d[id] not even expressly and fully recognize the existing powers of the Confederacy"), it was necessary to vest supreme authority in Congress. *Id.* No. 44, at 286-87. If the Constitution had (hypothetically) contained a savings clause instead, Madison observed, "the new Congress would have been reduced to the same impotent condition with their predecessors," *id.* at 286, and federal laws might even have had different application in different States, *id.* at 287.

Joseph Story, writing decades later, reached much the same conclusion. Echoing Hamilton, Story wrote that the Supremacy Clause "only declares a truth, which flows immediately, and necessarily from

the institution of a national government." III Joseph Story, *Commentaries on the Constitution of the United States* § 1831, p. 694 (1833) ("Story"). "The propriety" of the Clause "would seem to result from the very nature of the constitution." *Id.* at 693. Its principle therefore would have been "necessarily implied" if it had not been in the text, *id.*, but it was "introduced from abundant caution, to make its obligation more strongly felt by the state judges." *Id.* at § 1833, p. 697.

In explaining "Rules of Interpretation" of the Constitution, Story wrote: "Whenever the question arises, as to whom obedience is due," *i.e.*, to a State or to the federal government, "it is to be judicially settled" by the Supremacy Clause, "and being settled, it regulates, at once, the rights and duties of all the citizens." I Story at § 414, p. 397. Thus, where federal law creates a right or a defense, there is a right to judicial relief, and the Supremacy Clause establishes the rule of decision. But there was no indication that the Supremacy Clause was understood to supply a cause of action otherwise.

C. Historical Evidence Therefore Leads To The Inference That The Supremacy Clause Was Not Intended To Create A Free-Standing Cause Of Action Absent A Federal Right.

The historical evidence makes it deeply improbable that the Supremacy Clause of its own force was understood to create a federal cause of action for pre-emption even when no federal rights or defenses are at issue. No such consequences arose from the aspects of colonial charters that served as the model for the Supremacy Clause and judicial

review in the States, and nothing in the Clause's early history suggests that the Framers understood it as doing anything more. Indeed, in light of the role the Supremacy Clause served at the Convention — a consensus measure when the Framers decided against comprehensive federal review of State legislation — interpreting the Clause as creating a cause of action of that sort would reverse the Framers' plans. The Clause, after all, contemplated the resolution of State-federal legal conflicts during ordinary litigation as a substitute for a highly intrusive review of State legislation. To treat it as authorizing private lawsuits in *all* cases of arguable federal pre-emption would replicate much of the intrusion the opponents of the negative found troubling, and that the Supremacy Clause was specifically intended to avoid.

II. THIS COURT HAS NOT INTERPRETED THE SUPREMACY CLAUSE AS CREATING A FREE-STANDING CAUSE OF ACTION ABSENT A FEDERAL RIGHT.

The Supreme Court's past pronouncements on the Supremacy Clause are consistent with this historical understanding. Briefly, they establish that the Supremacy Clause provides a rule for resolution of conflicts between State and federal law when they arise in the course of ordinary litigation — and that a federal defense to State coercion can create an equitable cause of action under appropriate circumstances — but it does not create the free-standing cause of action contemplated by Respondents.

A. Respondents' Cause Of Action Is Inconsistent With Existing Methods Of Vindicating Federal Rights And Defenses.

This Court has explained that the Supremacy Clause "is not a source of *any* federal rights[.]" *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (emphasis added); *accord Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (contrasting the Supremacy Clause with the Commerce Clause). Rather, the Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Chapman*, 441 U.S. at 613. The "right," in other words, must derive either from some other provision of the Constitution itself or from federal statute. This confirms Justice Story's view that the Supremacy Clause "settle[s]" the question of federal supremacy "[w]henever [it] arises." I Story at § 414, p. 397. The question is *how* conflicts between federal rights and State laws, resolvable through the Supremacy Clause, actually arise. Caselaw shows that absent a federal right or defense, the Supremacy Clause of its own force does not provide a cause of action.

As a general matter, federal rights "come into conflict with state law" in the context of enforcement of either pre-empted State law or federal rights. For example, it is elementary that when a State applies its law (including tort law) in a suit against a federally regulated entity, the defendant is free to raise federal pre-emption as an affirmative defense to State-law coercion. *See, e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (addressing alleged pre-emption of State tort law by Federal Motor Vehicle Safety Standards); *Geier v. American*

Honda Motor Co., Inc., 529 U.S. 861 (2000) (same). Likewise, when a federal statute such as 42 U.S.C. § 1983 provides a private cause of action for vindication of federal rights, parties holding those rights can go to court to seek affirmative relief, including injunctive or declaratory relief against pre-empted State law. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989). It is undisputed in this case that Respondents are not subject to any State coercion and have no federal rights under the statute, so these uses of the Supremacy Clause do not pertain.

Under carefully defined circumstances, parties have a right in equity to assert an anticipatory defense against the enforcement of a pre-empted State law, and to obtain relief in the form of a writ of injunction or prohibition. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (recognizing federal court jurisdiction over a plaintiff's suit in equity to enjoin a State regulation that infringes federal rights). As the *Shaw* Court explained, the right to invoke the supremacy of federal law in cases of threatened enforcement of pre-empted State law is essentially an application of the equitable principles underlying *Ex parte Young*. *See Shaw*, 463 U.S. at 96 n.14 (citing *Ex parte Young*, 209 U.S. 123, 160-62 (1908)).[10] Suits of this type trace their history as far back as *Osborn v. Bank of the United States*, 22 U.S.

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[10] The question presented in *Ex parte Young* was not whether the plaintiff had a cause of action, but whether sovereign immunity would bar such a suit. The underlying equitable principles were not contested.

(9 Wheat.) 738 (1824), and are now largely uncontroversial.

But those cases, however, "involv[e] 'the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law.'" *Independent Living Ctr.*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) (quoting *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring)). Like the uses of the Supremacy Clause described above, such suits seek to assert federal constitutional or statutory rights — often, an implied federal right not to be subject to pre-empted State coercive authority — that void State enforcement proceedings. *See Young*, 209 U.S. at 155-56. Thus, although the regulated party brings the lawsuit, the Supremacy Clause is still a shield dependent on a federal right or defense, not a cause of action for affirmative relief.

Historically, in fact, the type of equitable action asserted in *Shaw* could *only* be used as a shield, and the Supremacy Clause functioned only as the rule of decision. The plaintiff in *Young* sought an anti-suit injunction under federal equity law, which supplied an equitable cause of action. *See generally* John Harrison, Ex Parte Young, 60 Stan. L. Rev. 989 (2008); *id.* at 1014. In cases like *Young*, plaintiffs seeking such an injunction had to show (1) a legal defense (such as pre-emption) to an impending legal action and (2) an argument that waiting to assert the defense at law would not be an adequate remedy. *Id.* at 997-999, 1014; *Scott v. Donald*, 165 U.S. 107, 114 (1897) ("[T]he circuit courts of the United States will restrain a state officer from executing an

unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him[.]") (quoting *Ex parte Tyler*, 149 U.S. 164, 191 (1893)); *see also* IV John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1363, p. 981-83 (5th ed. 1941); *Williams v. Neely*, 134 F. 1, 4 (1904) (discussing an equity case brought to pre-emptively assert a contractual defense).

Those two prerequisites have been satisfied in the overwhelming bulk of cases in which this Court has upheld relief based on federal supremacy, whether they have been explicitly addressed or not. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1642 (majority opinion) (plaintiff must have "a federal right" in order to seek judicial relief under *Young*); *accord Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 640 (2002) (enforcement of State administrative ruling), *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 94 (1992) (enforcement of State licensing laws), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156 (1978) (enforcement of State oil tanker restrictions); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 134 (1963) (enforcement of State agricultural standards).. To be sure, some cases are more difficult to fit into the historical paradigm.[11] To our knowledge,

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[11] One example is *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), where plaintiffs alleged that a State statute regulating trade with Burma was preempted by federal statute and unconstitutional under the Foreign Commerce

however, none of those cases does more than assume that a cause of action exists, and so they do not constitute binding precedent on the existence of a Supremacy Clause action. *E.g.*, *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."). Respondents in this case, lacking a "defense" that they could assert in an enforcement action by the State of Idaho, could not have made out a claim that would have met the traditional requirements for a preemption claim. Consequently, this Court's preemption cases following *Young* do not pertain either.

In addition, under equity, only negative injunctive relief was permitted. The *Young* Court emphasized that the rule it announced would not extend to offensive uses of equitable causes of action, like Respondents' effort to force States to take affirmative action to conform to federal law in the absence of a federal right. *Ex parte Young*, 209 U.S.

Clause. Although this Court resolved the case only on the preemption argument, which was the narrower rationale, the plaintiffs also asserted a cause of action under the Commerce Clause, *see Dennis*, 498 U.S. at 446-47, which had been decided in their favor by the court of appeals, *see National Foreign Trade Council v. Natsios*, 181 F.3d 38, 62 (1st Cir. 1999). The defendants did not question whether the plaintiffs had a cause of action to raise the preemption argument standing alone, and thus forfeited that argument.

at 158; *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 516 (1954) (distinguishing between negative injunctive relief permitted by *Ex parte Young* and affirmative relief foreclosed by the Eleventh Amendment). This Court has recently reiterated that very point. *Virginia Office for Protection & Advocacy*, 131 S. Ct. at 1639 (no right under *Young* to seek specific performance of State's contract).

B. Respondents' Cause Of Action Is Inconsistent With Existing Federal Statutory Remedies.

To expand the cause of action contemplated by *Young* and *Shaw* to plaintiffs without federal rights or defenses, furthermore, would bring it into tension with the causes of action actually enacted by Congress, and with the limitations this Court has placed on implying additional statutory causes of action.

1. Respondents' theory conflicts with this Court's precedent on implied statutory causes of action.

All parties, including Respondents, appear to agree that Congress did not intend 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act to create a private right of action, and that this Court's test for implying a statutory cause of action therefore is not met. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008). And yet Respondents have brought suit to enforce that provision against the State of California for their own benefit. To put the matter most starkly, all parties agree that Section 1396a does not create a

private cause of action, *but Respondents are suing under it anyway*, aided by nominal reliance on the Supremacy Clause. Respondents' use of the Supremacy Clause would override the limitations this Court has properly placed on implied statutory causes of action.

The consequences would be extraordinary. Today, this Court finds implied statutory causes of action "*only* if the underlying statute can be interpreted to disclose [congressional] intent to create one[.]" *Stoneridge*, 552 U.S. at 164-65 (emphasis added). That rule rests on the sound presumption that "[t]he decision to extend the cause of action is for Congress, not for us." *Id.* at 165. This Court's role has been "to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). And in the absence of Congressional intent, this Court has held "that a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87.

Respondents' theory, in contrast, would mean that *every* federal statute implicitly authorizes a private cause of action against State or local governmental defendants under the Supremacy Clause, whether it creates causes of action or affirmative defenses or not, so long as it has potentially pre-emptive effects. That rule has no evident limiting principle. Federal criminal statutes generally do not create private rights of action, *see United States v. Claflin*, 97 U.S. 546, 547 (1878)

("That act contemplated a criminal proceeding, and not a civil action.... It is obvious, therefore, that its provisions cannot be enforced by any civil action...."), and "there is no federal right to require the government to initiate criminal proceedings against an individual," *Davis v. Jordan*, 573 F. App'x 135, 137 (3d Cir. 2014) (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973)), but Respondents' theory implies that a private party could use federal criminal statutes to enjoin the acts of State agents as "preempted." This court has held that even self-executing treaties are presumed not to create causes of action, *see Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008); *Restatement (Third) of the Foreign Relations Law of the United States* § 907, cmt. a (1987), but Respondents' theory also presumably implies that every one of them can nonetheless be enforced against States by individuals seeking injunctions. By limiting implied causes of action before, this Court has rejected Respondents' position, and should do so again.

2. Respondents' theory would render Section 1983's equitable remedies redundant.

Respondents' Supremacy Clause theory would also supplant much of Section 1983, which (as mentioned above) creates an injunctive remedy for violations of federal rights but not a free-standing cause of action in all instances of alleged pre-emption. *See, e.g.*, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (plaintiffs may not sue under § 1983 for State violation of federal statute unless the statute creates an "unambiguously conferred right"). Virtually every suit for an injunction under Section

1983, after all, could be characterized as alleging federal preemption, and under the Ninth Circuit's rule all a plaintiff would then need to establish is standing. Respondent's Supremacy Clause cause of action, in other words, renders a statutory cause of action and remedy almost entirely redundant.

That effect is even more striking because members of the Congress that enacted Section 1983's predecessor in 1871 evidently believed that its equitable remedies were *new*, and necessary to vindicate federal rights. Senator Frelinghuysen supported the bill on the ground that an "injured party should have an original action in our Federal courts, so that by injunction he could have relief" for violations of his rights. Cong. Globe, 42d Cong., 1st Sess., at 501 (1871). Senator Carpenter said that before the Fourteenth Amendment, Congress lacked the "affirmative power" to "save the citizen from the violation of any of his rights by the State Legislatures[.]" "[T]he only remedy," he said, "was a judicial one *when the case arose*." *Id.* at 577 (emphasis added). Just as the Supremacy Clause's history indicates, vindication of federal rights had to await occasion for defensive use. As for affirmatively compelling State compliance with federal law, Representative Lowe understood it to be impossible without Section 1983: "The Federal Government cannot serve a writ of *mandamus* upon State Executives to compel them to protect the rights, privileges, and immunities of citizens. There is no legal machinery for that purpose. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* at 376. Even against the background of federal cases such as *Osborn*,

AMICUS CURIAE BRIEF

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AND
BRIEFS

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In the Supreme Court of the United States

RICHARD ARMSTRONG, *et al.*,
Petitioners,

v.

EXCEPTIONAL CHILD CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae* National Health Law Program, AARP, Service Employees International Union, National Legal Aid and Defender Association, Sargent Shriver National Center on Poverty Law, National Disability Rights Network, DisAbility Rights Idaho, Center for Medicare Advocacy, National Senior Citizens Law Center, First Focus, National Center for Youth Law, National Center for Law and Economic Justice, National Housing Law Project, National Women's Law Center, Planned Parenthood Federation of America, National Family Planning & Reproductive Health Association, National Latina Institute for Reproductive Health, Asian Americans Advancing Justice Los Angeles, Southern Poverty Law Center in Support of Respondents

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INTEREST OF THE AMICI

Amici are organizations committed to serving the needs of low-income persons, including older Americans, individuals with disabilities, children, and women of child-bearing age. *Amici*'s work involves promoting public awareness of the disproportionate need for health care and barriers to care experienced by these populations and advocating for their interests and legal rights. It is in this last capacity that *amici* submit this Brief, asking the Court to affirm the decision below.[1]

The **National Health Law Program** is a 40-year-old public interest law organization that engages in education, litigation and policy analysis to advance access to quality health care and protect the legal rights of low-income and underserved people. **AARP** is a nonprofit, nonpartisan organization with a membership that strengthens communities and fights for the issues that matter most to families such as health care, employment, income security, retirement planning, affordable utilities and protection from financial abuse. AARP supports access to and expansion of quality health care through publicly administered health insurance programs, including Medicaid, an essential safety net program that provides coverage to people who would otherwise be denied health care. To further that end, Medicaid recipients'

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of this brief. No persons other than the *amici*, their members or their counsel made such a monetary contribution. The parties consented to the filing of this brief.

access to the courts to challenge the denial of Medicaid services is critical.

The **Service Employees International Union** (SEIU) is the nation's largest health care union, with more than half of its 2.1 million members in the health care field. SEIU is concerned about the ability of individuals to enforce Medicaid because it provides vital insurance coverage for millions of Americans, including SEIU members and their families.

The **National Legal Aid and Defender Association** is the largest organization in the United States dedicated solely to securing equal justice for the disadvantaged in the civil and criminal justice systems. NLADA members represent thousands of families in need of adequate health care and access to the courts. The **Sargent Shriver National Center on Poverty Law** advances laws and policies that improve quality of life and opportunity for people living in poverty. The Shriver Center has worked for many years on behalf of its clients to ensure access to Medicaid, quality health care for eligible people, and access to the courts to enforce their rights.

The **National Disability Rights Network** (NDRN) is the non-profit membership association of protection and advocacy (P&A) agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories. For 30 years, P&As have worked with children and adults with disabilities who depend on Medicaid-funded services and supports to enable them to live in the community rather than in institutions. **DisAbility Rights Idaho** (DRI) is a non-profit corporation providing legal and other advocacy assistance to Idahoans with disabilities. DRI has the

responsibility to provide advocacy services to Idahoans with developmental disabilities including legal representation. DRI has been representing people with disabilities in Medicaid appeals for over 35 years. DRI is vitally concerned with the Idaho Medicaid system and its services for people with disabilities.

Founded in 1986, **the Center for Medicare Advocacy** is a non-profit public interest law organization that represents older and disabled people throughout the United States. The Center works to advance fair access to Medicare, Medicaid and quality health care through individual representation, education, policy analysis, administrative advocacy, and litigation. The **National Senior Citizens Law Center** (NSCLC) is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 40 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC works to ensure access to the federal courts to enforce safety net and civil rights statutes, particularly the Medicaid Act, a critical source of health insurance for millions of older persons and people with disabilities.

First Focus is a bipartisan advocacy organization that is committed to making children and families a priority in federal policy and budget decisions. In all of its work, First Focus strives to ensure that every child in America has access to the high quality, comprehensive, affordable health care they need to grow up to become healthy and productive adults. The **National Center for Youth Law** (NCYL) is a private,

non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives.

Founded in 1965, the **National Center for Law and Economic Justice** is a national law office that advocates on behalf of low-income individuals to assure their access to Medicaid and other safety net benefits. NCLEJ's work with low-income community groups and individuals confirms that Medicaid is critical to the ability of low-income people to receive health care. The **National Housing Law Project** is a charitable nonprofit corporation established in 1968 whose mission is to use the law to advance housing justice for low-income people by increasing, preserving and improving the supply of decent, affordable housing; by expanding and enforcing tenants' and homeowners' rights; and by increasing housing opportunities for people protected by fair housing laws.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights since its inception in 1972. NWLC's work includes advocating for health coverage for low-income women of all ages through the Medicaid program. NWLC joins this Brief in this capacity. **Planned Parenthood Federation of America** (PPFA) is the nation's largest

and most trusted voluntary reproductive health care organization. PPFA's 66 affiliates operate approximately 700 health care centers nationwide. In addition to providing reproductive health care, PPFA and its affiliates are among the nation's most active and widely recognized advocates for increased access to comprehensive reproductive health services and education. PPFA is committed to promoting and preserving full reproductive choice for all people and to providing access to high quality, confidential, reproductive health services. The **National Family Planning & Reproductive Health Association** (NFPRHA) is a national membership organization representing the broad spectrum of family planning administrators and providers who serve the nation's low-income, underinsured, and uninsured women and men. NFPRHA's members operate or fund a network of nearly 5,000 safety-net health centers and service sites that provide high-quality family planning and other preventive health services to millions of individuals in all 50 states and the District of Columbia. The mission of the **National Latina Institute for Reproductive Health** (NLIRH) is to ensure the fundamental human right to reproductive health and justice for Latinas, their families and their communities through public education, community mobilization and policy advocacy. NLIRH is the nation's only reproductive health policy and advocacy organization working on behalf of the reproductive health and justice of the nation's 26 million Latina women. **Asian Americans Advancing Justice - Los Angeles** (Advancing Justice LA), formerly the Asian Pacific American Legal Center, is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders. Advancing Justice LA serves

more than 15,000 individuals every year, including low-income Medicaid beneficiaries. Advancing Justice – LA has a long history of representing vulnerable members of our communities in federal courts on a broad range of issues, including health care and public benefits.

The **Southern Poverty Law Center** (SPLC), based in Montgomery, Alabama, is a non-profit organization founded in 1971 to advance and protect the rights of minorities, the poor, and victims of injustice in significant civil rights and social justice matters. SPLC particularly seeks to address the unique systematic barriers faced by people living in or on the edge of poverty in the Deep South, particularly when state laws, regulations, and procedures are preempted by federal law. Access to health care is an issue of fundamental significance to the populations we seek to serve, and that access is enabled in part by the enforceability of federal health care laws through the Supremacy Clause.

SUMMARY OF ARGUMENT

The history and purpose of the Medicaid Act illustrate the need for private enforcement when states' violations of the Medicaid Act are harming program beneficiaries. This Court has long recognized the right of program beneficiaries and health care providers to enforce the Supremacy Clause and enjoin state laws that are inconsistent with provisions of the Medicaid Act and other Social Security Act titles. The statutory scheme of the Medicaid Act does not preclude private enforcement, and Congress has enacted legislation to preserve private enforcement of the Social Security Act by program beneficiaries. The federal government has

repeatedly taken the position that private enforcement should complement federal agency remedies.

ARGUMENT

I. THE HISTORY AND PURPOSE OF MEDICAID SHOW THE NEED FOR PRIVATE ENFORCEMENT.

Millions of Americans depend on their states' Medicaid programs operating pursuant to the Constitution and as Congress intended. Over the 50-year history of the Medicaid Act, private enforcement has consistently been the primary means of halting ongoing state violations of federal law and realizing Medicaid's promises and protections.

Title XIX of the Social Security Act established Medicaid in 1965. *See* 42 U.S.C. §§ 1396-1396w-5. Cooperatively funded by the federal and state governments, Medicaid is designed to provide low-income people who meet the program's eligibility requirements with health insurance that will allow them to obtain care and services from the private health care sector, including hospitals, doctors, pharmacies, nursing facilities, and home health care agencies. *See* Rand E. Rosenblatt et al., *Law and the American Health Care System* 415 (1997). Congress' "very clear ... intent [was] that the medical and remedial care and services made available to recipients under Title XIX be of high quality and in no way inferior to that enjoyed by the rest of the population." *Id.* at 416, *quoting* U.S. Dep't of Health, Educ., & Welfare, *Handbook of Public Assistance Administration* § D-5140.

Before Medicaid was enacted, low-income, uninsured people only could obtain health services through a patchwork of programs, such as hospital charity care and local programs for the poor. This system provided uneven coverage from state to state and within states. The Medicaid Act was intended to change this by providing for a uniform and statewide medical insurance program, while allowing for some variation among states. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 266 (July 30, 1965). Designed for people with disabilities and the limited finances of low-income people, Medicaid was tailored to cover a fuller range of necessary health and support services not then typically covered by private insurance. Medicaid's purpose is to help enrolled individuals to "attain or retain capability for independence or self-care." 42 U.S.C. § 1396-1.

Over 68 million Americans—more than one in every five—depend on Medicaid or the much smaller Children's Health Insurance Program (CHIP) for their health care at some point during the year. *See* Dep't of Health & Human Servs., *Medicaid & CHIP: October 2014 Monthly Applications, Eligibility Determinations and Enrollment Report* 2 (Dec. 18, 2014) [hereinafter *Medicaid & CHIP Enrollment Report*], http://medicaid.gov/medicaid-chip-program-information/program-information/downloads/october-2014-enrollment-report.pdf; Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid Moving Forward* 1-2 (June 2014), http://files.kff.org/attachment/the-medicaid-program-at-a-glance-update-fact-sheet (reporting over 66 million Americans enrolled in Medicaid). While most enrollees live in working families, Medicaid includes newborns, children,

pregnant women, individuals with physical and intellectual disabilities and mental illnesses, and poor elderly and disabled Medicare beneficiaries.

Medicaid is the largest source of health insurance for children in the United States. In 2013, over 45 million children (more than one in three children), including about one million children in foster care, obtained coverage for medical, dental and developmental screening and treatment through Medicaid or CHIP. *See* Dep't of Health & Human Servs., *2014 Annual Report on the Quality of Care for Children in Medicaid and CHIP* 1 (Nov. 2014), http://www.medicaid.gov/medicaid-chip-program-information/by-topics/quality-of-care/downloads/2014-child-sec-rept.pdf. Of the more than 98 million U.S. women between the ages of 15 and 44, 12 percent rely upon Medicaid for services, including breast and cervical cancer screening and treatment, testing and treatment for sexually transmitted diseases, and pregnancy-related care. See Kaiser Family Found., *Women's Health Insurance Coverage* (Nov. 6, 2013), http://kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/.

Medicaid covers approximately 9.3 million non-elderly individuals, including 1.5 million children, with severe physical and/or mental disabilities (*e.g.*, cerebral palsy, Down Syndrome, autism). Medicaid also covers more than 9 million Medicare beneficiaries (one in every five), based on low income. Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid: A Primer* 1, 9 (Mar. 2013) [hereinafter *Medicaid Primer*], http://kaiserfamilyfoundation.files.wordpress.com/2010/06/7334-05.pdf. These so-called "dually eligible"

beneficiaries account for only 15 percent of Medicaid enrollees but 38 percent of Medicaid spending. *Id.* Medicaid is the largest single purchaser of long-term care services for the elderly and non-elderly people with disabilities in the United States. More than six of every ten nursing facility residents are covered by Medicaid, and Medicaid covers about 40 percent of the total long term care expenditures in the United States. *Id.* at 1, 4.

Effective January 1, 2014, a Medicaid provision extends eligibility to nonelderly, nondisabled, childless adults with incomes below 133 percent of the federal poverty level. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). As of October 2014, 26 states and the District of Columbia had implemented the expansion. In these states, Medicaid and CHIP enrollment rose by more than 24 percent compared to the 2013 baseline period, whereas enrollment rose by seven percent in states that have not expanded their Medicaid programs to childless adults. *See Medicaid & CHIP Enrollment Report, supra*, at 3.

Over its 50-year history, the Medicaid Act has played a pivotal role in the arrangement of and funding for health services. Implementation of the Act has resulted in dramatic improvements in health insurance coverage and health status of covered populations. It has reduced the numbers of uninsured, helped provide near-universal protection against communicable childhood diseases, played a major role in reducing infant mortality rates, and provided a critical life line to individuals with chronic and disabling conditions. *See, e.g., Medicaid Primer, supra*, at 1-2. Medicaid is a

cornerstone of the nation's health care system for low-income Americans.

Medicaid is an entitlement program. Accordingly, "all individuals" who meet the eligibility requirements are entitled to receive a federally established set of benefits with "reasonable promptness." *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(8). *See Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981) ("An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives."). The federal and participating state governments have a legal obligation to pay for and administer medical assistance needed by program beneficiaries in compliance with the requirements of the Medicaid Act and implementing regulations. *Id.* Thus, Medicaid coverage responds as emerging populations and economic needs arise, including rising unemployment, loss of private health care coverage, disasters (for example, providing short-term benefits for 350,000 New Yorkers following the 9/11 terrorist attacks), increasing disability rates, and an aging society. *See Medicaid Primer, supra*, at 6.

Entitlement to Medicaid triggers legal rights, including the right to enforce certain statutory requirements that are placed on the states. It is this entitlement that makes Medicaid insurance and that assures individuals that coverage will be there when care is needed. Since the beginning of the Medicaid program, beneficiaries have been able to make their entitlement real by bringing *Ex parte Young* actions for prospective injunctive relief against state officials who are engaged in ongoing violations of federal law. *See*

Section II, *infra*. These cases have been based not only on 42 U.S.C. § 1983 but also on the Supremacy Clause.

II. THIS COURT HAS CONSISTENTLY ALLOWED PROGRAM BENEFICIARIES TO ENJOIN STATE LAWS THAT ARE INVALID UNDER THE SUPREMACY CLAUSE, AND CONGRESS HAS RECOGNIZED THIS RIGHT.

From the very beginning, on numerous occasions dating from the early 1970s, this Court has recognized that beneficiaries of Social Security Act programs can bring preemption actions to enjoin state laws that conflict with federal law and are, thus, "invalid under the Supremacy Clause." *Townsend v. Swank*, 404 U.S. 282, 285 (1971). In *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (per curium), the Court held that a state statute that conflicted with the Social Security Act was preempted by operation of the Supremacy Clause. The Court noted that the Social Security Act "unambiguously rules out any attempt to attach Social Security benefits," while the Arkansas statute at issue in the case "just as unambiguously allows the State to attach those benefits." *Id.* at 397. The Court held that "this amounts to a 'conflict' under the Supremacy Clause—a conflict the State cannot win." *Id.*; *see Blum v. Bacon*, 457 U.S. 132, 138 (1982) (holding state welfare regulations that conflicted with regulations promulgated pursuant to the Social Security Act "are invalid under the Supremacy Clause"); *N.Y. State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 423 n.29 (1973) (applying preemption analysis but finding no inconsistency, noting that "[c]onflicts [in Social Security Act programs], to merit judicial rather than cooperative

federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control."); *Carleson v. Remillard*, 406 U.S. 598, 604 (1972) (holding that a California regulation excluding a parent's absence because of military service from the definition of "continued absence" from home conflicted with Social Security Act AFDC eligibility provisions and was invalid under the Supremacy Clause); *see also Ark. Dept. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (assuming preemption cause of action without discussion). *See also PhRMA v. Walsh*, 538 U.S. 644 (2003) (plurality opinion) (deciding merits of preemption claim brought by provider organization); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 478 (1996) (applying Supremacy Clause in provider case and remanding for entry of injunction to extent state constitution conflicted with Medicaid Act).

In 1994, Congress amended the Social Security Act in two sections to make it clear that private causes of action are available to program beneficiaries. *See* 42 U.S.C. §§ 1320a-2, 1320a-10. Those amendments overruled parts of *Suter v. Artist M.*, 503 U.S. 347 (1992). They also affirmed the clear understanding of Congress that program beneficiaries would maintain access to the courts on the grounds that were recognized by this Court prior to 1992, the year *Suter* was decided. *See* H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), reprinted in 1994 U.S.C.C.A.N. 2901, 3257 ("The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandate of the State plan titles of the Social Security Act are able to seek

redress in the federal courts to the extent that they were able to prior to the decision in *Suter v. Artist M.*"). The Supremacy Clause cause of action was recognized well before *Suter*, and sections 1320a-2 and 1320a-10 clearly mean that Congress intends preemption actions under the Supremacy Clause to live on as a means of preventing state officials from acting contrary to the requirements of the Social Security Act. Moreover, private enforcement of Social Security Act provisions must be considered in context with these congressional amendments, not simply the Court's observation in other contexts that "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (assessing provision of spending clause enactment that was not part of the Social Security Act); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (same).

The petitioners voice concern that a litigation floodgate will be produced if plaintiffs are able to enjoin state laws that are invalid under the Supremacy Clause. However, this ignores the decades long history of Medicaid enforcement by federal courts through the use of prospective injunctions tailored to end the harm caused by a state's ongoing violation of federal law. In a line of cases dating back more than 40 years, each of the circuit courts of appeals have used Supremacy Clause analysis to determine the validity of state Medicaid laws without dire consequences coming to pass. *See, e.g., PhRMA v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) (considering whether state statute

conflicted with Medicaid so as to be invalid under Supremacy Clause); *Concourse Rehab. & Nursing Ctr., Inc. v. Whalen*, 249 F.3d 136, 146 (2d Cir. 2001); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 178 (3d Cir. 1995) ("The Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law ... and compels compliance by participants in Title XIX federal aid programs with federal law and regulations."); *Randall v. Lukhard*, 709 F.2d 257 (4th Cir. 1983), *aff'd in part en banc*, 729 F.2d 966 (4th Cir. 1984) (finding that a Virginia rule was invalid because it conflicted with a provision of the Medicaid Act); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005) ("[I]t is well-established that the federal courts have jurisdiction under 28 U.S.C. § 1331 over a preemption claim seeking injunctive and declaratory relief."); *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 637 (6th Cir. 1996) (because Michigan law "conflicts with the program requirements of Medicaid, it must be held invalid under the Supremacy Clause"); *Zbaraz v. Quern*, 596 F.2d 196, 202 (7th Cir. 1979) (remanding with instructions to enjoin enforcement of state law to the extent it conflicted with Medicaid); *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (granting recipients' request to enjoin Medicaid service cutback, holding "preemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when state law conflicts with a federal statute or regulation"); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985) (applying "settled proposition that state regulations which are inconsistent with federal [Medicaid] law are invalid under the Supremacy Clause"); *Hern v. Beye*, 57

F.3d 906, 906 (10th Cir. 1995) (affirming injunction prohibiting enforcement of state law "to the extent it conflicts with federal Medicaid law"); *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 663-64 (D.C. Cir. 1983) ("It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.").

III. THE MEDICAID ACT'S STATUTORY SCHEME IS CONSISTENT WITH THE NEED FOR PRIVATE ENFORCEMENT OF THE SUPREMACY CLAUSE TO PREVENT STATE MEDICAID OFFICIALS FROM ACTING CONTRARY TO FEDERAL LAW.

In its brief supporting the petitioners, the United States argues that allowing Medicaid providers access to the courts is inconsistent with Medicaid's "statutory scheme" vesting enforcement authority in the Department of Health and Human Services (DHHS). Brief for the United States as Amicus Curiae Supporting Petitioners at *10-11 Armstrong v. Exceptional Child Ctr. et al. (Nov. 2014) (No. 14-15) [hereinafter U.S. Exceptional Child Ctr. Brief 2014]. This argument conflicts with Supreme Court precedent and the expressed opinion of Congress and ignores DHHS's limited enforcement authority.

A statutory enforcement scheme either substitutes for private enforcement or it does not. In *Wilder*, this Court has held that the Medicaid Act does not contain a statutory scheme that replaces private enforcement. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990); *see generally City of Rancho Palo Verdes v.*

Abrams, 544 U.S. 113, 121-22 (2005) (listing Medicaid as a statute whose private judicial enforcement is not foreclosed based on a statutory enforcement scheme). When Congress amended the Social Security Act in 1994, it expressed its intent that private enforcement of the Social Security Act be determined according to the grounds applied in this Court's decisions prior to 1992. *See* 42 U.S.C. §§ 1320a-2, 1320a-10.

To be sure, Medicaid's statutory scheme includes a provision authorizing the Secretary of DHHS to enforce federal Medicaid law: 42 U.S.C. § 1396c authorizes the Secretary to terminate federal funding to states whose plans are not in compliance with the Act. Termination of federal funding to states is a draconian remedy, one that DHHS has rarely used over the 50-year history of Medicaid. As noted by the United States when it opposed certiorari when the issue before the Court was first raised in 2011: "[P]rograms in which the drastic measure of withholding all or a major portion of federal funding if the only available remedy would be generally less effective than a system that also permits awards of injunctive relief in private actions." Brief for the United States as Amicus Curiae Opposing Certiorari at *19, Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., 572 F.3d 644 (9th Cir. 2009) on petition for cert. December 2010.[2] *See also Va. Office for Prot. & Advocacy v.*

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[2] As evidence that DHHS is "committed to ensuring that" Medicaid beneficiaries have meaningful access to covered services, the United States cites a regulation proposed by DHHS more than four years ago when the similar case, *Douglas v. Independent Living Center of Southern California*, Nos. 09-958, 09-1158, 10-283, was pending before the Court. U.S. Exceptional Child Ctr. Brief at *10 (citing Medicaid Program; Methods for Assuring

Stewart, 131 S. Ct. 1632, 1639 n. 3 (2011) ("The fact that the Federal Government can exercise oversight of a federal spending program and even withhold or withdraw funds—which are the chief statutory features respondents point to—does not demonstrate that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*.") (citation omitted)).

Despite the position taken here, the United States has elsewhere recognized that private enforcement complements the Secretary's oversight. This complementary role exists whether the particular statutory provision is enforceable through the Supremacy Clause or through section 1983. For example, in May 2011, Indiana enacted a statute that barred certain entities that perform abortions from participating in Medicaid. Medicaid-participating providers who were barred from providing services and Medicaid recipients who lost access to care filed suit in federal court arguing that the state law was preempted by a specific Medicaid Act provision and also that they had a federal right under 42 U.S.C. § 1983 to enforce the provision. The United States filed an amicus brief urging the court to enjoin implementation of the

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Access to Covered Medicaid Services, 76 Fed. Reg. 26342 (May 6, 2011)). The proposed regulation does not contain an enforcement scheme that would render the need for private enforcement unnecessary. And while issuance of a final regulation will hopefully provide guidance that states will follow, thereby decreasing noncompliance with the statutory requirement of rates sufficient to assure equal access, the regulation does not remove the necessity of private enforcement in situations where recalcitrant states continue to ignore the statutory mandate.

Indiana law. *See* Statement of Interest of the United States at *21-22, Planned Parenthood of Indiana, Inc. v. Commissioner of the Ind. State Dep't of Health, June 16, 2011 (S.D. Ind. No. 1:11-cv-00630-TWP-DKL). According to the United States, the recipients' and providers' request for injunctive relief was "particularly necessary" because "Indiana has expressed its view that operating a 'non-compliant program' is a 'lawful option for the State under the [Medicaid] statute,' so long as the State is willing to 'risk that the Secretary will turn off the funding spigot." *Id.* at *21-22; *see also, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at *30, Blessing v. Freestone, 520 U.S. 329 (1997) (No. 95-1441) (arguing that private enforcement is "an important complement to the Secretary's necessarily macroscopic oversight of the State, by assuring that States carry out the specific duties" of the Social Security Act and arguing that federal-state cooperative program of the Social Security Act does not contain a statutory scheme that precludes private enforcement); Brief for the United States as Amicus Curiae Opposing Certiorari at *19, Maxwell-Jolly v. Indep. Living Ctr. of S. Cal., 572 F.3d 644 (9th Cir. 2009) on petition for cert. December 2010 at *19 (No. 09-958) (arguing that limiting enforcement to agency review and withholding of funding "overlooks the important role private parties can and often do play in vindicating federal law.... A system that relies solely on agency review may often be less effective in ensuring the supremacy of federal law than a system of agency review supplemented by private enforcement."). *Cf. Chisholm v. Hood*, 110 F. Supp. 2d 499 (E.D. La. 2000) (ordering State to cover physical and related therapy services for Medicaid-eligible children six years

after CMS had informed the State that the Act required coverage of these services).

Nor do the private parties have another adequate remedy, despite some suggestions to the contrary. *See PhRMA*, 538 U.S. at 675 (Scalia, J., concurring). In *PhRMA*, Justice Scalia suggested that the plaintiffs only remedy for a violation of the Medicaid Act is to ask the Secretary to terminate federal funding and thereafter file an Administrative Procedure Act action if they are dissatisfied with the outcome. *Id.* at 675 (citing 5 U.S.C. § 706(2)(A)). However, there is no such administrative and appeal process for Medicaid beneficiaries to seek termination of federal funds scheme, *see* 42 U.S.C. § 1316 (citing § 1396c). Federal regulation allows a state to obtain administrative and judicial review when it is dissatisfied with the denial of a state plan amendment or federal withhold of funding. *See* 42 C.F.R. §§ 430.30-430.104. Only CMS and the state are automatic parties to the administrative hearing, *id.* at § 430.76, and only the state has a right to judicial review, *id.* at § 430.38. The regulation permits individuals to petition the federal agency for permission to participate in the hearing, but participation is within the discretion of the presiding officer at the hearing. *Id.* at § 430.76. The ability of a recipient or provider to seek permission to participate in a state's hearing before the Department is not a statutory scheme that displaces private enforcement. *See Rosado v. Wyman*, 397 U.S. 397, 406 (1970) (refusing to attach significance to the fact that HEW (predecessor to DHHS) was engaged in a study of the issues before the Court or to impose an "exhaustion of administrative remedies" requirement, noting that under the regulations recipients could not "have

obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs."); *Almenzares v. Wyman*, 453 F.2d 1075, 1087 (2d Cir. 1971) (finding administrative petition scheme inadequate because of the "inability of welfare recipients to trigger such a proceeding, along with the natural reluctance of HEW to embark on a course that could lead to withdrawal of federal aid"); *Ariz. Dep't of Pub. Welf. v. Dep't of Health, Educ. & Welf.*, 449 F.2d 456. 464, n.9 (9th Cir. 1971) (finding courts without jurisdiction to hear petitions from welfare recipients because § 1361 limits review to petitions from states and suggesting recipients bring direct declaratory action in district court finding such a remedy "preferable to a judgment ordering the cessation of the flow of federal [welfare] funds"). *See also Wilder*, 496 U.S. at 514 n.12 (acknowledging position of United States that there is no remedy under the APA because the decision to accept a state's assurance is entrusted to agency discretion); *id.* at 521-22 (rejecting argument that an action against the Secretary under the APA forecloses private enforcement).

IV. PRIVATE ENFORCEMENT OF MEDICAID ACT PROVISIONS PURSUANT TO 42 U.S.C. § 1983 IS NOT AT ISSUE HERE.

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002), clarified that private enforcement under 42 U.S.C. § 1983 is limited to federal statutes that create federal rights because they exhibit unambiguous congressional intent to benefit the individual plaintiff. The enforcement test under § 1983 is well-established, and § 1983 is not at issue here. As of December 2014, all of the federal

circuit courts of appeals, with the exception of the D.C. Circuit, have reviewed at least one § 1983 Medicaid case since *Gonzaga* was decided. Consistent with this Court's instruction, the courts have decided enforceability on a provision-by-provision basis. *See Blessing v. Freestone*, 520 U.S. 329, 342 (1997) ("Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights."). Forty-one cases, reviewing the enforceability of 23 different Medicaid Act provisions, have been decided by courts of appeals since *Gonzaga*. There are no splits among the circuits.[3] *See* National Health Law Program, *Update on Private Enforcement of the Medicaid Act* (Oct. 2014), http://www.healthlaw.org/publications/browse-all-publications/Issue-brief-medicaid-supremacy-clause#.VIC2VsmRKng.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request the Court to affirm the judgment of the circuit court.

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[3] Unlike other appellate courts, in a decision post-dating *Gonzaga*, the Eighth Circuit allowed enforcement of 42 U.S.C. § 1396a(a)(30)(A) in a law-of-the-case decision that was vacated on other grounds. *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), *vacated on other grounds Selig v. Pediatric Specialty Care*, 551 U.S. 1142 (2007). *See Minn. Pharm Ass'n v. Pawlenty*, 690 F. Supp. 2d 809, 820-21 (D. Minn. 2010).

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In the Supreme Court of the United States

RICHARD ARMSTRONG AND LISA HETTINGER,
PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Supremacy Clause give Medicaid providers a private right of action to enforce 42 U.S.C. § 1396a(a)(30)(A) against a State when Congress chose not to create enforceable rights under that statute?

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In the Supreme Court of the United States

No. 14-15

RICHARD ARMSTRONG AND LISA HETTINGER,
PETITIONERS

v.

EXCEPTIONAL CHILD CENTER, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, INDIANA, KANSAS, MARYLAND, MICHIGAN, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

Several courts of appeals have held that the Supremacy Clause authorizes private lawsuits to enforce *every* federal statute against state officials—even when Congress has refused to provide a private right of action to

enforce that federal statute, and even when the statute does not create federal "rights" enforceable under 42 U.S.C. § 1983. *See, e.g.*, *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1058 (9th Cir. 2008); *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 333 (5th Cir. 2005). The amici curiae States have an interest in this case because they have been subjected to unwarranted lawsuits on account of this misguided interpretation of the Supremacy Clause.

SUMMARY OF ARGUMENT

The Ninth Circuit's "preemption" holding should be reversed for three independent reasons.

First, the Ninth Circuit erred by interpreting the Supremacy Clause to establish a constitutionally created private right of action to sue state officials. The Ninth Circuit's holding allows any private plaintiff with Article III standing to sue to enjoin any state law or regulation alleged to conflict with *any* federal statute—even when the federal statute fails to provide a private right of action for its enforcement. That approach to the private-right-of-action issue is incompatible with numerous decisions of this Court, and represents a radical departure from the notion that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Second, even if the Ninth Circuit were correct to recognize an implied right of action in this case, its holding should still be reversed because 42 U.S.C. § 1396a(a)(30)(A) is incapable of "preempting" state law. *See* Pet. Br. 49–54. The Medicaid Act does nothing more than establish criteria for federal reimbursement. It

does not obligate States to comply with the 42 U.S.C. § 1396a(a)(30)(A) once they accept federal Medicaid funds, and it affirmatively permits States to establish partially compliant Medicaid programs and risk a partial reduction (or total elimination) of federal reimbursement in the future. *See* 42 U.S.C. § 1396c; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012). The Medicaid Act is no different from the statute that promises to reduce federal highway funding for States that fail to maintain a 21-year-old drinking age. *See* 23 U.S.C. § 158(a)(1)(A). It is perfectly lawful for a State to depart from 42 U.S.C. § 1396a(a)(30)(A) and risk a reduction or cut-off of federal funds. The State may lose federal funds on account of that choice, but its choice is not (and cannot be) "preempted."

Third, even if the Medicaid Act were capable of preempting state law, and even if there were a cause of action to bring "preemption" claims against state officials, the Court should *still* reverse the Ninth Circuit's preemption holding under the doctrine of primary jurisdiction. Rather than engage in its own de novo interpretation of 42 U.S.C. § 1396a(a)(30)(A), which is rife with vague and ambiguous language, the Ninth Circuit should have abstained and waited for the Centers for Medicare & Medicaid Services (CMS) to opine on the legality of the State's policy. *Cf. Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1210 (2012) (holding that CMS's interpretations of the Medicaid Act "carr[y] weight").

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY HOLDING THAT THE SUPREMACY CLAUSE AUTHORIZES PRIVATE LITIGANTS TO SUE STATE OFFICIALS WHO VIOLATE FEDERAL LAW

The Ninth Circuit's understanding of the Supremacy Clause is untenable for many reasons—not least of which is that it renders 42 U.S.C. § 1983 superfluous and allows private litigants to make an end-run around the decisions from this Court that purport to limit state-official liability. *See Douglas*, 132 S. Ct. at 1213 (Roberts, C.J., dissenting) ("[T]o say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence."); *see also* NGA Amicus Br. at 32–34. This Court has long held that state officials may be sued under section 1983 only when they violate federally protected *rights*—not whenever they violate some provision of federal *law*. *See Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989) ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law."); *see also Gonzaga Univ. v. Doe*, 536 U. S. 273, 286 (2002) ("[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under §1983 or under an implied right of action."). Yet the Ninth Circuit declared that officials who act under color of state law may be sued for injunctive relief whenever

they violate *any* provision of federal law—so long as a litigant can establish Article III standing. *See Indep. Living Ctr.*, 543 F.3d at 1058 (endorsing "the right of private parties to seek injunctive relief under the Supremacy Clause regardless of whether the allegedly preemptive statute confers any federal 'right' or cause of action."); Pet. App. 2–3. This means that Congress's decision to enact section 1983 was a meaningless gesture, and that Congress's decision to limit state-official liability to violations of federally protected "rights" has no legal effect.

All of this is well explained in Chief Justice Roberts's dissenting opinion in *Douglas*—and in other scholarly opinions that reject the Ninth Circuit's approach. *See Planned Parenthood of Kan. and Mid-Mo. v. Moser*, 747 F.3d 814, 822–36 (10th Cir. 2014); *The Wilderness Society v. Kane Cty.*, 581 F.3d 1198, 1233–34 (10th Cir. 2009) (McConnell, J., dissenting). Yet there are even more reasons why the Ninth Circuit's interpretation of the Supremacy Clause should be repudiated.

A. Nothing In The Language Of The Supremacy Clause Purports To Authorize Private Litigants To Sue State Officials For Violating Federal Law

Any analysis of whether the Supremacy Clause authorizes private lawsuits should begin with the text of that constitutional provision. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008). Yet the Ninth Circuit's opinion in *Independent Living Center* never deigns to analyze the constitutional text that it purports to interpret. Neither do the other federal appellate decisions

that claim to have discovered a private right of action in the Supremacy Clause. *See, e.g., P.R. Tel. Co., Inc. v. Mun. of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006); *Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997); *Lewis v. Alexander*, 685 F.3d 325, 345–46 (3d Cir. 2012); *United States v. South Carolina*, 720 F.3d 518, 526 (4th Cir. 2013); *Sanchez*, 403 F.3d at 333; *Chase Bank USA, N.A. v. City of Cleveland*, 695 F.3d 548, 554 (6th Cir. 2012).

There is nothing in the language of the Supremacy Clause that could possibly establish a private right of action to sue state officials. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

This language merely provides a choice-of-law rule directed to the "Judges in every State." Those judges must regard the Constitution, federal statutes, and treaties as "supreme," while subordinating all other forms of law (such as state law, international law, and judicial precedents) to the "supreme Law of the Land." Nothing in the text of the Supremacy Clause purports to establish subject-matter jurisdiction for federal courts to adjudicate alleged conflicts between "supreme" and "non-

supreme" laws, and it assuredly does not provide a cause of action authorizing private litigants to sue state officers (or anyone else) who violate a provision of supreme federal law. The power of federal courts to adjudicate these disputes, and the right of private litigants to bring these claims, must come from some other source.

The Supremacy Clause says nothing about the crucial issues that define this cause of action that the Ninth Circuit claims to have found in the Constitution. Who can be sued under this cause of action? Anyone who violates a federal law or treaty? Only state officials? The State itself? And what relief may be obtained from these alleged federal lawbreakers? Money damages or only injunctive relief? Would there be a right to jury trial?[1] If the Supremacy Clause had been understood to authorize private lawsuits by persons seeking to vindicate federal law, one would expect the Supremacy Clause to say *something* about these questions. Its silence on these matters indicates that it does not authorize lawsuits by private citizens against state officials.

Indeed, it hard to imagine that the Constitution would have been ratified if the Supremacy Clause had been understood to establish a private right of action to sue state officials. The swift response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), shows that the notion of subjecting States to suit in federal court was unac-

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[1] The Seventh Amendment secured the jury right only in cases at common law; most cases alleging a violation of a federal statute by state officials would fall outside the scope of the Amendment.

ceptable at the time of the founding,[2] and a construction of the Supremacy Clause that would permanently entrench a cause of action for private citizens to bring "preemption" lawsuits against States or state officials would likely have triggered an equally fierce reaction. The extent to which individual citizens may sue state officials for violating federal statutes is an issue that the Constitution leaves to congressional legislation; it is not entrenched or resolved in the Constitution itself. *See Alexander*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) ("[T]he power of taking cognizance of any question between individuals, or between the government and individuals ... must be given by written law.").

B. The Ninth Circuit's Interpretation Of The Supremacy Clause Is Irreconcilable With This Court's Rulings In *Alexander v. Sandoval*, *Horne v. Flores*, And *Maine v. Thibotout*

The Ninth Circuit's interpretation of the Supremacy Clause contradicts no fewer than three decisions of this Court.

The first is *Alexander v. Sandoval*, 532 U.S. 275 (2001), which explicitly and emphatically holds that pri-

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[2] *See Alden v. Maine*, 527 U.S. 706, 719–24 (1999); 1 Charles Warren, *The Supreme Court in United States History* 91–102 (rev. ed. 1926).

vate rights of action to enforce federal statutes must be created by Congress:

> Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. *Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander, 532 U.S. at 286–87 (emphases added) (citations and internal quotation marks omitted). The Ninth Circuit's decision defies *Alexander* by recognizing a private right of action to enforce a federal statute that was *not* "created by Congress." Worse, the Ninth Circuit turns *Alexander* on its head by authorizing private litigants to sue directly under the Supremacy Clause whenever Congress declines to create a cause of action to enforce a federal statute—a regime diametrically opposed to the holding of *Alexander*.

The second is *Horne v. Flores*, 557 U.S. 433 (2009). *Horne* holds that there is no private cause of action to advance a preemption claim under the No Child Left

Behind Act (NCLB), because Congress did not provide for a cause of action to enforce that federal statute:

> *Whether or not HB 2064 violates § 7902*, see Brief for United States as Amicus Curiae 31–32, and n. 8 (suggesting it does), *neither court below was empowered to decide the issue.* As the Court of Appeals itself recognized, NCLB does not provide a private right of action. See 516 F.3d, at 1175. "Without [statutory intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Horne, 557 U.S. at 456 n.6 (emphasis added).

The Ninth Circuit's interpretation of the Supremacy Clause is incompatible with this discussion in *Horne*. According to the Ninth Circuit's opinion in *Independent Living Center*, any litigant should be allowed to bring an NCLB "preemption" claim directly under the Constitution—regardless of whether the NCLB establishes a cause of action—even though *Horne* declares that federal courts are not "empowered to decide" these preemption claims. *See id.* And there is no possible basis on which a court can distinguish "preemption" claims brought under the NCLB from "preemption" claims brought under the Medicaid Act; both statutes were enacted as spending legislation.

The third is *Maine v. Thiboutot*, 448 U.S. 1 (1980). *Thiboutot* held that litigants may use 42 U.S.C. § 1983 to enforce federal statutes (and not merely constitutional

provisions) that create individual "rights," and defended this conclusion by noting that previous cases had allowed litigants to sue to enforce statutory provisions in the Social Security Act (SSA). Writing for the Court, Justice Brennan insisted that these earlier cases necessarily relied on section 1983 because that was the *only possible source* for a cause of action to enforce the SSA:

> [O]ur analysis in several § 1983 cases involving Social Security Act (SSA) claims has relied on the availability of a § 1983 cause of action for statutory claims. . In each of the following cases *§ 1983 was necessarily the exclusive statutory cause of action* because, as the Court held in *Edelman v. Jordan*, 415 U.S. [651], at 673–674 [(1974)], *id.*, at 690 (Marshall, J., dissenting), the SSA affords no private right of action against a State.

Thiboutot, 448 U.S. at 5–6 (emphasis added). This passage makes clear that when the Social Security Act (or any other federal statute) fails to authorize private lawsuits against state officials, the *only* basis on which a private litigant may sue to enforce that statute is section 1983.

If the Ninth Circuit is correct, then *Thiboutot* is wrong. The Ninth Circuit held that section 1983 is *not* the exclusive cause of action for enforcing the SSA (even though *Thibotout* says that it *is*) because on the Ninth Circuit's view private litigants may sue directly under the Supremacy Clause regardless of whether section 1983 could authorize the suit. That means that *Thiboutot* was wrong to state that previous lawsuits brought

against state officials for allegedly violating the SSA necessarily relied on section 1983. Under the Ninth Circuit's reasoning, those pre-*Thibotout* cases could have relied on the Supremacy Clause to supply a cause of action, which means they do not have any implications for whether section 1983 is available to enforce statutory (as opposed to constitutional) rights.

C. The Ninth Circuit's Interpretation Of The Supremacy Clause Disables Congress From Precluding The Private Enforcement Of Federal Statutes And Treaties Against State Officials

The notion that the Supremacy Clause empowers private litigants to bring "preemption" claims against state officials who violate "supreme" federal law has radical and far-reaching implications. The Supremacy Clause gives treaties the same "supreme" status as federal statutes. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ..."). So under the Ninth Circuit's reasoning, every treaty obligation that conflicts with state law should be enforceable through private lawsuits brought directly under the Supremacy Clause. Even when a treaty is non-self-executing or fails to provide a private right of action, a litigant could rely on the Supremacy Clause to supply the cause of action—just as the plaintiffs were permitted to do here. That would require this Court to repudiate its observation in *Medellin v. Texas*, 552 U.S. 491 (2008),

that "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, Comment *a*, p. 395 (1986)).

The Ninth Circuit's holding would also leave Congress powerless to preclude "preemption" lawsuits brought to enforce federal statutes, because the Supremacy Clause is part of the Constitution and cannot be altered through ordinary legislation. At oral argument in *Douglas*, counsel for the respondents acknowledged that a statute explicitly prohibiting private rights of action to enforce the Medicaid Act would be unable to prevent a "preemption" lawsuit, because the cause of action is derived directly from the Constitution and therefore immune from congressional revision. *See* Oral Argument Transcript at 34, *Douglas*, 132 S. Ct. 1204. Although counsel later denied that this claim was "necessary" to his position, *see id.* at 34–35, it logically follows from the Ninth Circuit's interpretation of the Supremacy Clause. If a constitutional provision gives private litigants a right to seek judicial redress against state laws that conflict with federal statutes, then Congress is powerless to revoke or limit that constitutionally conferred right.

Once it is acknowledged that Congress may alter or abolish the cause of action on which the plaintiffs rely, then this case is no longer about the meaning of the Supremacy Clause, but about the meaning that should be attributed to congressional silence. When a federal stat-

ute—such as the Medicaid Act—neither explicitly authorizes nor explicitly precludes private lawsuits to enjoin conflicting state laws, should that statute be interpreted as permitting or foreclosing private lawsuits?

Although there once was a time when this Court readily inferred private rights of actions from statutes that were silent on the question, *see, e.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), those days have long since passed. The Court today insists on affirmative evidence of "statutory intent" to authorize private lawsuits. *See, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("As recently emphasized, the focus of the inquiry is on whether Congress intended to create a remedy. ... The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."); *Alexander*, 532 U.S. at 286–87. It makes no sense to apply a general statutory presumption *against* private rights of action, while simultaneously applying the opposite statutory presumption when it comes to private rights of action to enforce federal statutes against state officials acting under color of a preempted state law or policy.

D. *Ex Parte Young* Offers No Support For The Ninth Circuit's Holding

Some courts and commentators have argued that *Ex parte Young*, 209 U.S. 123 (1908), supports the Ninth Circuit's interpretation of the Supremacy Clause. But *Ex parte Young* does not establish that private litigants may sue to enjoin the enforcement of any state law that conflicts with a federal statute.

Ex parte Young allows litigants to bring preemptive lawsuits to enjoin state enforcement proceedings against them. This cause of action does not rest on the Supremacy Clause but on principles of equity that allow potential defendants at law to assert their defenses preemptively by seeking the equitable remedy of an anti-suit injunction. *See* John C. Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989 (2008); NGA Amicus Br. at 26–30. Five members of the Court have endorsed this understanding of *Ex parte Young*—as have the Seventh and Tenth Circuits. *See Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) ("[*Ex parte Young*'s] negative injunction was nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law."); *Douglas*, 132 S. Ct. at 1213 (Roberts, C. J., dissenting) (endorsing Justice Kennedy's explanation of *Ex parte Young*); *Planned Parenthood of Ind., Inc. v. State Dep't of Health*, 699 F.3d 962, 983 (7th Cir. 2012) (same); *Planned Parenthood of Kan. and Mid-Mo.*, 747 F.3d at 829–30 (same).

This view of *Ex parte Young* is far more sound than Professors Wright, Miller, and Cooper's claim that *Ex parte Young* authorizes private lawsuits for injunctive relief whenever a state official is accused of violating any provision of federal law. *See* 13B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3566, at 102 (1984) ("The best explanation of *Ex Parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening

to violate the federal Constitution or laws."); *see also Burgio & Campofelice, Inc.*, 107 F.3d at 1006 (relying on Wright, Miller, and Cooper's treatise to support an implied right of action under the Supremacy Clause); *Chase Bank USA, N.A.*, 695 F.3d at 554 (same). If Professors Wright, Miller and Cooper's view of *Ex parte Young* were correct, then *Horne v. Flores* should have permitted the litigants in that case to challenge Arizona's statute as "preempted" by the No Child Left Behind Act, rather than declaring that the federal courts were not "empowered to decide the issue." 557 U.S. at 456 n.6; *see also supra* at 9–10. And it hard to see how the Wright-Miller-Cooper understanding of *Ex parte Young* can be squared with *Medellin*'s holding that treaties "generally do not create private rights or provide for a private cause of action in domestic courts." 552 U.S. at 506 n.3; *see also supra* at 12–13.

E. None Of The Arguments Offered By The Ninth Circuit Or The Respondents In *Douglas* Are Persuasive

The Ninth Circuit's opinion in *Independent Living Center* did not provide any independent analysis of the implied-right-of-action question. *See* 543 F.3d at 1055–64. Instead, the Ninth Circuit acted as if this Court had long ago resolved the issue. *Id.* at 1065 ("Under well-established law of the Supreme Court ... a private party may bring suit under the Supremacy Clause to enjoin implementation of state legislation allegedly preempted by federal law."). The cases on which the Ninth Circuit relied, however, merely *assumed* the existence of a cause of action because the litigants did not contest the issue.

See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978); *Pharm. Research & Mfg. of Am v. Walsh*, 538 U.S. 644 (2003). When a cause of action is assumed because the parties waived or failed to lock horns over the issue, the case does not establish that a cause of action exists. *See Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). A State that forfeits a no-cause-of-action defense by failing to argue the issue does not preclude future States from raising that defense—and it does not allow a court of appeals to pretend that the binding precedent of this Court forecloses judicial consideration of that defense.

Some of the respondents in *Douglas* tried to characterize federal *statutory* violations as *constitutional* violations. *See* Br. of Resp. Santa Rosa Memorial Hospital at 1–2, 9–10, *Douglas*, 132 S. Ct. 1204 (Nos. 09-958, 09-1158, 10-283), 2011 WL 3288334. Their argument proceeded as follows: (1) The Constitution establishes an implied right of action to seek injunctive relief to remedy all constitutional violations. *Id.* at 9–10, 22–26. (2) The Supremacy Clause makes any violation of the Medicaid Act by state officials into a constitutional violation. *Id.* at 10–11, 30–

31. (3) Therefore, the Constitution provides an implied right of action to enforce the Medicaid Act against state officials.

The syllogism is unsound because the major premise (1) is wrong. Not all constitutional violations authorize private litigants to seek injunctive relief under an implied right of action. The Full Faith and Credit Clause, for example, does not establish an implied cause of action for injunctive relief—and neither does 28 U.S.C. § 1738, the statute that implements that constitutional command. *See Thompson v. Thompson*, 484 U.S. 174, 182–83 (1988) ("[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action. Rather, the Clause only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.") (citations and internal quotation marks omitted); *see also Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72 (1904). The Supremacy Clause may be characterized in much the same way. It "prescribes a rule by which courts ... are to be guided" in cases of conflict between federal and state laws. *Thompson*, 484 U.S. at 182. There is no basis for asserting that every "constitutional" violation must give rise to a private judicial remedy for injunctive relief.

The minor premise of the syllogism (2) is also mistaken. State officials do not violate the federal Constitution whenever they violate a federal statute or treaty. If they did, then every violation of a federal statutory right

would *per se* violate a right "secured by the Constitution." 42 U.S.C. § 1983. And then there would have been no need for the Court to resolve in *Thiboutot*, whether violations of federal statutory rights are actionable under section 1983, which provides a cause of action for those deprived of rights "secured by the Constitution *and laws*." 42 U.S.C. § 1983 (emphasis added). Yet the Court did not even consider it a possibility that it could bootstrap violations of federal statutory rights into constitutional violations, and instead spent five pages of its opinion analyzing whether the phrase "and laws" should extend to federal statutes. *See* 448 U.S. at 4–8; *see also Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (noting that "a certificate of appealability may be granted only where there is 'a substantial showing of the denial of a *constitutional* right.' [28 U.S.C.] § 2253(c)(2) (emphasis added). To obtain the necessary certificate of appealability to proceed in the Court of Appeals, Medellín must demonstrate that his allegation of a *treaty* violation could satisfy this standard."); *Legal Envtl. Assistance Found., Inc. v. Pegues*, 904 F.2d 644 (11th Cir. 1990) ("To imply from the Supremacy Clause a cause of action against a state official for review of the Administrator's interpretation of the federal statute or, as here, to dispute the Administrator's interpretation of the regulations the Agency has promulgated, would be to bootstrap a statutory claim that should be asserted against the Administrator into a constitutional issue. Applying [*Ex parte*] *Young* in these circumstances would ignore the important distinction between remedies implied to redress constitutional violations and remedies, whether implied or express, for violations of statutory rights."); *Andrews v. Maher*, 525

F.2d 113, 118–19 (2d Cir. 1975) ("Plaintiffs also argue that a claim that state welfare regulations violate the Social Security Act is in fact a claim ... of deprivation of rights "secured by the Constitution," because such a claim cannot succeed without ultimate resort to the Supremacy Clause. ... We reject the contention because it transforms statutory claims into constitutional claims by verbal legerdemain.").

The argument also proves too much. If state officials violate Article VI of the Constitution whenever they fail to comply with "supreme" federal law, then do so private actors. The supremacy of federal law declared in Article VI is as binding on private citizens as it is on state officials. Yet no one contends that the Supremacy Clause provides a cause of action against private individuals who violate federal statutes or treaties. *See, e.g.*, *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 330 (5th Cir. 2008) (refusing to interpret the Supremacy Clause to establish a right of action "against private parties").

II. EVEN IF THE SUPREMACY CLAUSE ESTABLISHES A "PREEMPTION" CAUSE OF ACTION, THE PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE 42 U.S.C. § 1396a(a)(30)(A) IS INCAPABLE OF PREEMPTING STATE LAW

Even if one accepted the Ninth Circuit's dubious construction of the Supremacy Clause, there is a more fundamental problem with the plaintiffs' lawsuit: A state law or policy cannot be "preempted" by a federal statute that does nothing more than specify criteria for federal reim-

bursement. As the petitioners' brief convincingly demonstrates, the Medicaid Act is no different from the statute withholding federal highway money from States with a sub-21 drinking age. *See* 23 U.S.C. § 158(a)(1)(A).[3] It merely promises federal reimbursement to States that comply with the criteria in the Medicaid Act, and threatens to withhold part or all of that money from noncompliant States. That a State may be docked federal money for its policy decisions does not make those policy decisions unlawful.[4]

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[3] 23 U.S.C. § 158(a)(1)(A) provides: "The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful."

[4] Neither the petitioners nor the amici States are arguing that spending legislation can *never* preempt state law. Some spending legislation, such as Title VI of the Civil Rights Act of 1964 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), imposes binding legal obligations on entities that accept federal funds. These statutes require any "program or activity receiving Federal financial assistance" to refrain from racial discrimination and accommodate religious liberties. *See* 42 U.S.C. § 2000d; 2000cc(a)(2)(A). Under these laws, entities must renounce or return federal aid before deviating from the specified conditions; otherwise they become federal lawbreakers by violating conditions imposed on the receipt of federal funds. *See Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); Pet. Br. 50–51. The Medicaid Act does not use the language of Title VI or RLUIPA; nowhere does the Medicaid Act say anything akin to: "No State that receives federal Medicaid funds shall ..." The Medicaid Act does nothing more than *promise* federal (continued...)

The idea that a State becomes legally bound to comply with 42 U.S.C. § 1396a(a)(30)(A) once it accepts federal Medicaid money is wrong. A State is not legally required to maintain a 21-year-old drinking age once it accepts federal highway money. Idaho could lower its drinking age tomorrow, wait for the Secretary of Transportation to respond by reducing federal highway funds on the first day of the next fiscal year, and proceed with business as usual. If anyone tried to sue Idaho officials on the ground that 23 U.S.C. § 158(a)(1)(A) "preempts" their efforts to lower the State's drinking age, the lawsuit would be dismissed on the ground that State officials have not violated any federal law—even though the State is acting in a manner that may cause it to lose federal money.

The Medicaid Act works the same way. If Idaho offers rates for residential rehabilitation services that depart from the criteria in 42 U.S.C. § 1396a(a)(30)(A), then Idaho may lose some or all of its federal Medicaid reimbursement. But Idaho does not violate federal law by provoking the Secretary of Health and Human Services to reduce or eliminate its federal funding. It is *perfectly lawful* to operate a non-compliant Medicaid program; nothing in federal law compels the States to permanently establish a fully compliant Medicaid program once they accept federal Medicaid money. And 42 U.S.C. § 1396c removes any doubt on this score by allowing the Secre-

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reimbursement to States whose Medicaid programs satisfy the criteria of 42 U.S.C. § 1396a. It is not possible for a State to "violate" such a statute.

tary to *continue funding* partially compliant States, by withholding only a portion of their federal Medicaid allotment:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C. § 1396c. This statute clearly and unequivocally gives States the lawful option of accepting a reduction (or even elimination) of federal payments and continuing with their non-compliant Medicaid programs. Yet on the

Ninth Circuit's view, no State could ever opt out of Medicaid or choose to accept a partial reduction in federal reimbursement—because a private litigant will be able to sue and enjoin the State's officials as soon as they deviate from *any* provision in the Medicaid Act. Only a belief that Medicaid is forever can support such an approach.[5]

It has become common for courts to say that States are legally bound to follow the provisions in the Medicaid Act once they decide to participate in the program. *See, e.g.*, *Sanchez*, 403 F.3d at 337 ("[O]nce a state has accepted federal funds, it is bound by the strings that accompany them."). That is not a defensible construction of the Medicaid Act, and in all events that proposition cannot be sustained after *NFIB v. Sebelius*. As this Court recognized in *NFIB*, the Medicaid Act explicitly permits the Secretary to continue funding a non-compliant State, and withhold funding only from the "categories" or "parts" of the State's program that fail to comply with the federal reimbursement criteria. *See* 42 U.S.C. § 1396c; *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J.); *id.* at 2642 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Partially compliant Medicaid programs are not on-

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[5] Under the Ninth Circuit's reasoning, it is not clear how a State could ever opt out of this supposedly "voluntary" Medicaid program. Is the State required to return every dollar of federal reimbursement that it has received since the inception of Medicaid? *But see NFIB*, 132 S. Ct. at 2603–04 (prohibiting federal officials from imposing "coercive" penalties on States that choose not to comply with Medicaid's reimbursement criteria).

ly acceptable and lawful, they may even continue to receive federal money if the Secretary chooses to fund the compliant aspects of the State's program. Just as every State may decline to implement the Medicaid-related provisions in the Affordable Care Act and accept a reduced allotment of federal money, so too may a State establish a partially compliant Medicaid program and wait to see if the Secretary will defund part or all of the State's Medicaid program. A State does not violate *any* provision of federal law by acting in this manner.[6]

Finally, this Court has never rejected the argument that the Medicaid Act is incapable of "preempting" state law. Some decisions have *assumed* that the Medicaid Act may preempt state law—but only because the state's attorneys in those cases failed to argue (and therefore forfeited) the contention that the Medicaid Act does nothing more than establish criteria for federal reimbursement. *See* Br. for the Petitioners, *Ark. DHHS v. Ahlborn*, No. 04-1506, 2005 WL 3156905 (2005); Br. for

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[6] Neither the petitioners nor the state amici are arguing that withholding federal funds represents the exclusive means of "enforcing" the Medicaid Act against state officials. *See, e.g., Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 28 n.11 (1981); *Blessing v. Freestone*, 520 U.S. 329, 349–50 (1997) (Scalia, J., concurring). The claim is that the Medicaid Act *does not impose any legal obligations* on participating States. Like the federal highway statute and the 21-year-old drinking age, the Medicaid Act merely offers federal reimbursement to state Medicaid programs that satisfy certain criteria. There simply are no federal obligations to "enforce," because a State *acts legally* when it deviates from provisions in the federal Medicaid Act.

the Petitioner, *Delia v. E.M.A.*, No. 12-98, 2012 WL 5532211 (2012). These cases do not and cannot establish a precedential holding that the Medicaid Act is capable of preempting state law—any more than the cases that assumed a private right of action because the issue went uncontested by the litigants can establish a precedential holding that a cause of action exists. *See supra* at 16–17; *see also Brecht*, 507 U.S. at 630–31 ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters*, 511 U.S. at 678 (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp.*, 531 U.S. at 557 (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed."). Neither Idaho nor the amici States can be precluded from making this argument simply because lawyers from other States omitted this claim in past Medicaid disputes.[7]

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[7] Nothing in this argument precludes Medicaid providers or beneficiaries from asserting federally protected "rights" under 42 U.S.C. § 1983. Title VI's prohibition on race discrimination imposes binding legal obligations on all entities that receive federal funds, which includes state Medicaid agencies. And there may be provisions in the Social Security Act that establish federal "rights" under the test in *Gonzaga*. But the statutory provision at issue in this case is nothing more than a condition for receiving continued federal reimbursement, and it neither imposes legal obligations on participating States nor creates federal rights. *See* 42 U.S.C. §§ 1396a(a)(30)(A), 1396c.

III. THE DOCTRINE OF PRIMARY JURISDICTION REQUIRED THE LOWER COURTS TO ABSTAIN AND REFER THIS MATTER TO CMS BEFORE ENJOINING THE STATE'S OFFICIALS

Even if this Court believes that the plaintiffs have a cause of action, and even if this Court further believes that the Medicaid Act is capable of "preempting" state law, the court of appeals' judgment should *still* be reversed under the doctrine of primary jurisdiction. "Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency." *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 201 (5th Cir. 1988); *see also Pharm. Research & Mfg. of Am.*, 538 U.S. at 673–74 (Breyer, J., concurring in part and concurring in the judgment) (noting that "the legal doctrine of 'primary jurisdiction' permits a court itself to 'refer' a question to the Secretary" and that "courts may raise the doctrine on their own motion"); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.4, at 946 (4th ed. 2002) ("[C]ourts frequently hold that an issue of federalism—an arguable conflict between the goals of a statute administered by a federal agency and the effects of a state action—should be referred to the federal agency for initial resolution under the primary jurisdiction doctrine."). The language of 42 U.S.C. § 1396a(a)(30)(A) is couched in vague and general terms that cry out for agency elaboration. *See, e.g.*, 42 U.S.C. § 1396a(a)(30)(A) (requiring a State's Medicaid plan to provide reimbursement "consistent with efficiency, economy, and quality of care and

are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area"). The court of appeals should have abstained and referred this matter to CMS before enjoining the State's officials.

CMS has never disapproved or complained of Idaho's reimbursement rates for residential habilitation services. *See* Pet. Br. 7 ("At no time relevant to this case has CMS ever initiated any compliance action or otherwise complained about the State's rates or its compliance with the DD Waiver."). Nor has CMS opined on whether Idaho's policy comports with 42 U.S.C. § 1396a(a)(30)(A). In these situations, a federal court should give CMS an opportunity to express its views and defer to those views before embarking on a de novo interpretation of the Medicaid Act.

Douglas holds that CMS's interpretations of the Medicaid Act—and its judgments whether a State plan complies with the Medicaid Act—"carr[y] weight." The Court explained:

> The Medicaid Act commits to the federal agency the power to administer a federal program. And here the agency has acted under this grant of authority. That decision carries weight. After all, the agency is comparatively expert in the statute's subject matter. And the language of the particular provision at issue here is broad and general, suggesting that the agency's expertise is relevant in determining its application.

132 S. Ct. at 1210. *Douglas* did not resolve whether private litigants could ever challenge a CMS-approved state Medicaid plan by suing the State's officials (as opposed to suing the Secretary in an APA lawsuit), and left this issue for the Ninth Circuit to resolve on remand. *Id.* at 1211. But *Douglas* unequivocally holds that CMS's views are relevant in determining whether a lawsuit brought against state Medicaid officials can proceed, and in determining whether a State's policies comply with the reimbursement criteria in the Medicaid Act.

The court of appeals' approach permits private litigants to push aside CMS's interpretive role by filing a lawsuit before the agency has an opportunity to address the legality of the State's policy. That is incompatible with the role that *Douglas* establishes for CMS in interpreting the Medicaid Act. *See generally* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 395 (1982) (noting that when a statute "has imposed duties on the states, but has delegated to a federal agency the authority to enforce those duties against the relevant state officials ... [the] recognition of a private cause of action ... could disrupt the statutory enforcement scheme and undermine the agency's ability to make law and policy.")

When litigants challenge a Medicaid policy that CMS has neither approved nor disapproved, the federal court should stay its hand and solicit the agency's views before plowing ahead with its de novo views of what the Medicaid Act requires. *See, e.g.*, *Dartmouth-Hitchcock Clinic v. Toumpas*, No. 11-cv-358-SM, 2012 WL 4482857, at *1 (D.N.H. Sept. 27, 2012) (relying in part on *Douglas*); *Miller ex rel. v. Olszewski*, No. 09-13683, 2009 WL

5201792, at *8–*9 (E.D. Mich. Dec. 21, 2009); *Affiliates, Inc. v. Armstrong*, Nos. 1:09-cv-00149-BLW, 1:11-cv-00307-BLW, 2011 WL 3421407, at *7 (D. Idaho Aug. 4, 2011). This is especially true when interpreting a provision as ambiguous as 42 U.S.C. § 1396a(a)(30)(A).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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